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LEADING CASES SIMPLIFIED.

A COLLECTION OF THE LEADING CASES IN

EQUITY AND CONSTITUTIONAL LAW.

BY

JOHN D. LAWSON,

*Author of "A Concordance of Words, Phrases and Definitions,"
"Usages and Customs," "Expert and Opinion Evidence."*

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PRÉFACE.

The favor with which my first volume of *LEADING CASES SIMPLIFIED* has been received by the profession is the inducement which has led me to treat the cases in *EQUITY* and in *CONSTITUTIONAL LAW* in the manner I before adopted in presenting to the practitioner and the student the leading cases of the *COMMON LAW*.

I take the liberty to repeat in this, my second volume of *LEADING CASES SIMPLIFIED*, the aim which I announced in my first volume: 1. To give the reader a collection of the acknowledged leading cases in *EQUITY* and *CONSTITUTIONAL LAW*. 2. To present these in a style which shall arrest his attention, render it possible for him to acquire their principles readily, and fix those principles in his mind unincumbered by unimportant and sometimes unintelligible facts. How far I have succeeded in both volumes I leave the profession to judge.

The many exceptions to which all the elastic rules of equity are subject have made it necessary for me, in many instances, to append notes to the cases in which to set out and explain these exceptions. The spaces left at the ends of these notes the student will find convenient places in which to mark, for his own instruction, any subsequent cases which may come under his notice in his reading.

I intend at an early day to complete this series by a volume of *Leading Cases in the Criminal Law*.

J. D. L.

ST. LOUIS, June, 1883.

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PART I.

EQUITY CASES SIMPLIFIED.





EQUITY CASES SIMPLIFIED

USES AND TRUSTS.

TYRREL'S CASE.

[Dyer, 155a.]

Jane Tyrrel, widow, was the heroine of this important case. The facts need not be given here, for it is sufficient for the student to remember only the important principle it decides, which is stated in nine words, and shall be written in large capitals, viz. : **THERE CAN NOT BE A USE UPON A USE.**

Previous to the reign of Henry VIII., when a very important law called the Statute of Uses was passed, a method of transferring an estate had sprung up having peculiar features, but grounded on very practical reasons. The Statutes of Mortmain had prohibited lands from being given for religious purposes. To evade these statutes, the lawyers of that day devised the method of taking grants to third persons to the use of the religious bodies. This ruse was very successful, and became very popular. Rebellions were the order of the day about that time, and somebody was being beheaded and having his estate forfeited once or twice a week. When it was found that the use, unlike the estate, was not liable to

be forfeited for treason, everybody that had land went into the business of having his property fixed in this way. B. wished to obtain a certain piece of land. Instead of having it deeded to himself, he had the document purport to convey it to C. for the use of B. Thus C. held the legal estate, and with C. alone could the courts deal at all.

It was right here that the chancellor, the forerunner of our modern courts of chancery, took a hand in the game. The chancellor was the keeper of the king's conscience, and what he didn't know about conscience wasn't worth knowing. So, in the case just put, he decided that this declaration of use charged the conscience of C., and C. held the land in trust for B., and he, the chancellor, would protect this trust estate in the hands of C. for the benefit of B.

Hence arose the doctrine of Trusts. The courts of law had no jurisdiction in such matters, and the chancellor had plenty to do. Presently, however, another player came into the game, viz.: Parliament, and, by enacting the celebrated Statute of Uses, seemed for a time to have got the chancellor's head in chancery. This statute (27 Henry VIII., ch. 10,) provided that where any persons should stand seised of any hereditaments to the use, confidence, or trust of any other persons, etc., the persons, etc., who had any such use, confidence, or trust should be deemed in lawful seisin and possession of the same hereditaments for such estates as they had in the use, trust, or confidence. This seemed to be a finisher; it was intended to extirpate the whole doctrine of uses and trusts. But the decision of the common law judges in Tyrrel's case completely nullified it. This case decided that there could be *no use upon a use, i.e.*, if land was conveyed to A., to the use of B. to the use of C., the statute would execute the first use and carry the legal title to B., but that it could not go as far as C. Then the chancellor came into the game again, and declared that in such a case B. held the land in trust for C., and he would take care of C.'s estate as of old. So, as remarked by an able writer, the statute, so far from affecting its object, gave a fresh stimulus to the system it was intended to destroy. After the decision in Tyrrel's case, and the chancellor again stepped in, the equitable doctrine of trusts became permanent.

Another important statute affecting trusts is the Statute of Frauds, passed in the twenty-ninth year of the reign of Charles II. By sect. 3 of that act trusts must be declared or assigned in writing. But implied trusts do not fall within this statute. Its provisions have been adopted in nearly all the States.

Definition of Trusts —A trust is the beneficial title or ownership of property to which the legal title is in another. The person in whom the legal title is vested is called the trustee, and the person for whose benefit the trust exists is called the *cestui que trust*.

SHELLEY'S CASE.

[1 Co. 93b.]

This (the *pons asinorum* of the student), like Tyrrel's case, is more important for its results than for its facts. The principle which it announced was that where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs or the heirs of his body, the word "heirs" is a word of limitation, and not of purchase; so that the ancestor takes the whole estate comprised in the term; that is to say, in the first case, an estate in fee simple; in the second, an estate in fee tail.

This is the language in which a lawyer (if you ask him and do not forget his fee) will generally relate to you the rule in Shelley's Case. The meaning of the rule is simple enough, viz.: that where there is a gift to a person and his heirs, or the heirs of his body, it is not to be taken as conferring any estate on the heir, but simply showing or marking out the estate that the ancestor takes. Thus an estate is given to A. for life, and remainder to his heirs in fee simple, this means simply that A. has an estate in fee simple, and his heirs take nothing by the conveyance itself.

The "rule in Shelley's Case" applies to equitable as well as legal estates (except in case of executory trusts, for which see Lord Glenorchy v. Bosville, the next case); but where one limitation is legal, and the other equitable, it does *not* apply. Thus a grant unto and to the use of A. for life, with remainder to the heirs, or heirs of the body, of A. gives A. a fee simple or fee tail, as the case may be, and if an intermediate estate to a third party were given after the life estate to A., and before the limitation to his heirs or heirs

of the body, the result would be the same, subject to the intervening estate; but if the grant is unto and to the use of A. for life, with remainder to the use of B. and his heirs in trust, for the heirs or heirs of the body of A., here A. would take but a life estate and his heirs or heirs of the body would take as purchasers.

So the rule applies, although there may be an intervening estate between the gift of freehold to the ancestor and the subsequent limitation to the heir; thus, if an estate is limited to A. for life, and after his decease to B. for life, and then to the heirs of A., here A. takes a fee simple subject to the intervening estate for life to B. The rule is of very ancient origin. *Indermaur Ld. Cas. Eq. 25.*

*EXECUTED AND EXECUTORY TRUSTS —
“EQUITY FOLLOWS THE LAW.”*

LORD GLENORCHY v. BOSVILLE.

[Cas. Temp. Talbot, 3; 1 Wh. & Tud. Ld. Cas. Eq. 1.]

Sir Thomas Pershall, a well-to-do knight of the eighteenth century, sat down one day and made his will: In this document he devised the bulk of his real estate to trustees, to hold in trust until the marriage of his granddaughter, Arabella, and when that event came to pass, they were to convey it to the use of Arabella for life, remainder to her husband for life, remainder to the issue of her body, with remainder over. In due course of time Arabella married Lord Glenorchy, but the trustees (Bosville being one of them) refused to turn over the property, and she and her husband were compelled to ask the aid of the Court of Chancery in the matter. Here the question at once arose, was not Arabella entitled, under the will, to have conveyed to her, an estate in tail, according to the rule in Shelley's Case, and would the Court of Chancery follow the rule of law on this subject, and order Bosville and his fellow trustees to convey this kind of an estate? But the court said no to this question.

“I think,” said the Lord Chancellor, “in cases of

trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same ; for there the testator does not suppose any other conveyance will be made. But in executory trusts he leaves somewhat to be done ; the trusts to be executed in a more careful and more accurate manner.”

And the court was of opinion that a conveyance to Arabella for life, remainder to her husband for life, remainder to their first and every other son, remainder to their daughter, would best carry out the testator’s intention ; and so they ordered this to be done.

This is the leading case, showing the distinction between *executed* and *executory* trusts. An *executed* trust is one where no act is necessary to be done to give effect to it, the trust being finally declared by the instrument creating it. An *executory* trust is where the instrument creating the trust is intended to be provisional only, and further conveyances are required to effectually carry it out. The test, as well put by an eminent judge, is this: Has the testator been his own conveyancer, or has he left something to be done? If the former, it is an executed trust; if the latter, it is an executory one. Now, Sir Thomas Pershall had clearly left something to be done, for before Arabella could get her property the trustees had to convey it to her.

The case also illustrates the maxim, “Equity follows the law.” Equity applies the rules of law to equitable titles and interests very often, but not always. In the case of executed trusts it does; in the case of executory trusts it does not.

*IMPERFECT CONVEYANCE MAY CONSTITUTE
A TRUST.*

WADSWORTH v. WENDELL.

[5 Johns. Ch. 224.]

A soldier in the Revolutionary War was entitled, by virtue of his patriotic services, to a grant of six hundred acres of land in New York State. He sold the land to Mr. Wadsworth, and undertook to make him a deed of it. But the veteran was not a good conveyancer, and though the instrument concluded, "in witness whereof I set my hand and seal," he forgot entirely to put on the seal. Notwithstanding that this informality was fatal to the legal transfer of the property, the court held that it raised a trust in favor of Wadsworth, and the old soldier's assignees were ordered to convey it to him, although they had subsequently purchased the same property themselves.

Courts of equity are not very strict in requiring the settlor to follow any particular forms of expression. He need not even use the words "trust" and "trustee." Where the agreement is founded on a *valuable consideration*, the court will enforce the trust, although it is not perfectly created; and, although the instrument does not pass the title to the property, if, from the document, the court can make out the terms and conditions of the trust, and the party to be benefited.

Where the settlor has attempted to make a *voluntary* disposition of his property, the rule, however, is different. *Ellison v. Ellison*,

6 Ves. 656; 1 Wh. & Tod. Ld. Cas. Eq. 273, is the leading English case on this point. In that case Lord Chancellor Eldon said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." Therefore, where a settlor actually constitutes himself a trustee for volunteers, a court of equity will enforce the trusts declared; as if he simply declares himself to be a trustee of the property for another, a complete trust is created and the court will act upon it.

But informally attempting to dispose of an interest (as in the soldier's case above) will not, *if the donee be a volunteer*, (i.e., one who pays nothing for the property, but gets it as a gift) constitute a trust for him. In an English case, Mr. Crauford made the following indorsement upon a receipt for a subscription in the Forth and Clyde Navigation Company: "I do hereby assign to my daughter, Anna Crauford, all my right, title and interest of, and in, the enclosed call, and all other calls of my subscription in the Clyde and Forth Navigation." This was no complete legal assignment, but it was attempted to be argued that the father meant to make himself a trustee for his daughter of these shares. It was, however, held that there was no trust created, the Master of the Rolls saying: "Mr. Crauford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. *He meant a gift*. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it, he has left imperfect. There is a *locus penitentiæ* as long as it is incomplete." *Antrobus v. Smith*, 12 Ves. 39. In another recent case, the greatest chancery judge of his day, JESSEL, M. R., thus summed up the law on this subject: "The principle is a very clear one. A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as

amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who, by those acts, acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. * * * The true distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise." *Richards v. Delbridge*, L. R. 18 Eq. 686.

In the absence of an express power of revocation in the instrument itself, a conveyance or declaration of trust in favor of a volunteer cannot be revoked or avoided, except in the case of an assignment of property in trust for creditors which is revocable until the creditors have assented to it.

PRECATORY TRUSTS.

HARDING v. GLYN.

[1 Atk. 469; 2 Wh. & Tud. Ld. Cas. Eq. 946.]

Nicholas Harding, by his will, gave all his personal property to his wife, but did desire her, at or before her death, to give the same unto and amongst such of his own relations as she should think most deserving and approve of. The student will note that Nicholas did not expressly require Mrs. H. to dispose of his property according to his wish, he simp'y desired her to do so. Yet the court held that the wife was only intended to take beneficially during her life, and that so much of the property not disposed of among his relations, should be divided equally amongst such of the relatives of the testator as were his next of kin at the time of his wife's death. "The words 'willing or desiring,' " said the court, "have been frequently held to amount to a trust."

When property is given absolutely to any person, and the same person is by the giver, recommended, desired, or entreated to dispose of it in favor of another, such recommendation, wish, or entreaty is held to create a trust, as though he had commanded the thing to be done. Such trusts are known to lawyers as precatory trusts. They come properly under the definition of express trusts, these being defined as trusts clearly expressed by the author or creator, or capable of being fairly collected from a written document. They cannot, of course, be said to be clearly expressed,

but yet on a correct interpretation of the whole instrument they may fairly be collected from it.

The recommendation, entreaty, or wish will be held *not* to create a trust.

1. *Where the words are so used that on the whole they ought not to be construed as imperative.*—The wish of the testator should be regarded as a command, if possible. The words in Mr. Harding's will made it clear that he intended her to take only during her life, and so a trust was enforced by the court. But if the giver accompanies his expression of a wish or desire by words which show that he did not intend it to be imperative, or did intend that the first taker was to have a discretionary power in the matter, then no trust will be enforced. An Irish gentleman of the name of Greene, some fifteen years ago, made a will in these words: "I give and bequeath all my property to my dearly beloved wife, Lydia, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children." The court held that this will did not create a precatory trust for the children, but that Lydia took all the property absolutely, for the document gave her "that discretionary power which cannot co-exist in the smallest measure with the creation of a precatory trust." *Greene v. Greene*, 3 Ir. Rep. (L.) 90, 629.

2. *Where the subject of the recommendation or wish is uncertain.*—The grandfather of William Wynne, in the year 1773, left his property by will to his wife, "not doubting but that she will dispose of *what shall be left at her death*, to our grandchildren." When grandmother Wynne died, William filed a bill against her personal representative to recover what was left; but, unfortunately for him, his bill was dismissed. "If the intention is clear what was to be given," said the Lord Chancellor, "and to whom, I should think the words not doubting, would be strong enough to create a trust. But *where it is uncertain what property was to be given*, the words are not sufficient." *Wynne v. Hawkins*, 1 Bro. C. C. 179.

3. *Where the objects or persons intended to have the benefit of the recommendation or wish are also uncertain.*—One Edward Moore, clerk, made a will which illustrates this rule. He bequeathed all his worldly goods to his wife, Mary, recommending to her, and not doubting that she would consider his *near relations*, as he would have done if he had survived her. But the court held that Edward's brothers and sisters, though his only next of kin, took nothing by the will, for the words "*near relations*," were too vague

and uncertain to create a trust. "Supposing," said the court "that the words in this case would create a trust, those words are coupled with some degree of uncertainty. Who are the objects of the trust? Did the testator mean relations at his own death or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain." *Sale v. Moore*, 1 Sim. 535.

RESULTING TRUSTS — PARTY PAYING PURCHASE MONEY — ADVANCEMENT.

DYER v. DYER.

[2 Cox Ch. 92; 1 Wh. & Tud. Ld. Cas. Eq. 203.]

Simon Dyer paid the purchase money for some property in the county of Wilts, and had the deed made to himself, his wife Mary, and his son William, jointly. The effect of this kind of a conveyance was that when one of the three died, the two survivors took his share, and when another died, the longest liver got the whole. Mrs. Dyer died first, and then Simon went over to the majority, but not before he had made a will devising all his interest in the premises to the plaintiff. William very naturally considered all the property to be his own, but the plaintiff insisted that as the purchase money was all paid by Simon Dyer, William was only a trustee, and although the legal estate was in William, the equitable title to the property was in his father, and devolved, therefore, under the will, upon the plaintiff.

But the court held that though, if no relationship had existed, there would be a resulting trust in favor of the person paying the purchase money; yet the circumstance of William being the child of the purchaser,

operated to rebut the resulting trust, and William took the property beneficially as an advancement from the father.

The general rule on this subject is that if a person purchases property with his own money, and the deed is taken in the name of another, the latter holds the land in trust by implication of law, and without any agreement, for him whose money has paid for it. The reason of this doctrine is that the man who pays the purchase money is supposed to intend to become the owner of the property, and the beneficial title follows this supposed intention.

But a resulting trust will *not* arise.

1. *Where the purchase money is paid by the parent, and the conveyance is taken in the name of the child.*—Here the presumption of a trust is rebutted by the supposed intention of the parent to benefit the child; and the latter is held to take the property beneficially as an advancement. *Dyer v. Dyer* illustrates this exception. It should be noted that this exception applies to other relations than those of parent and child—it applies wherever the person stands *in loco parentis* to the party benefited—as the case of grandfather and grandchild, mother and daughter, husband and wife, and the like.

2. *Where the money is not paid at the time of the purchase.*—A payment made subsequently to the purchase cannot raise a trust. *Dudley v. Bachelder*, 53 Me. 403.

3. *Where the money is not advanced by the party in the character of a purchaser.*—As if one pay the purchase money by way of loan for another, and the conveyance is taken to the other, no trust will result to the one who thus pays the purchase money. *Perry on Trusts*, sect. 133.

4. *Where the transaction contravenes a statute or public policy.*—Thus where the laws of the State of New York prohibited an alien from taking and holding real property, and an alien, in order to evade their provisions, purchased a lot of land and had a conveyance made to a third person who was capable of holding, it was held there was no resulting trust in his favor. “Equity,” said Chancellor WALWORTH, “will never raise a resulting trust in fraud of the laws of the land.” The object of the English statutes as to the registry of ships is to give conclusive information as to the title of ships. Therefore, where A. advanced the purchase money of a ship which was registered in the name of B., it was held that

no trust would arise in favor of A. "The registry acts," said Lord ELDON, "were drawn upon this policy: that it is for the public interest to secure evidence of the title to a ship from her origin to the moment in which you look back to her history; how far throughout her ownership she has been British built and British owned; and it is obvious that, if where the title arises by act of the parties, the doctrine of implied trust in this court is to be applied, the whole policy of these acts may be defeated." *Ex parte Yallop*, 15 Ves. 68. And the same is true where the purpose is to defraud individuals. In New Jersey about twenty years ago, Jeremiah Baldwin complained to the court of chancery that his son-in-law, Campfield, was in possession of some of his property which he refused to give up, and asked the court to compel him to do so. Some seven years before, Baldwin, being pressed by his creditors, got his son-in-law to purchase the property at a sheriff's sale, he (Baldwin) furnishing the money, and Campfield taking the conveyance to himself to protect it from these creditors. But the court refused to declare and enforce a trust which had been resorted to for a fraudulent purpose. *Baldwin v. Campfield*, 8 N. J. (Eq.) 891.

5. Resulting trusts of this kind have been abolished by statute in some States; among them, Indiana, Kentucky, Michigan, Minnesota, Massachusetts, Maine, New York and Wisconsin. *Bisp. Eq.*, sect. 85.

II. But a resulting trust may arise in other ways, viz.:—

1. *Where a person holding a fiduciary position purchases property with the fiduciary funds and takes the title in his own name.*—A. is B.'s agent, and buys property with B.'s funds, but has the deed made to him (A.); or he is B.'s partner and purchases with the partnership funds and takes the title to himself alone; or he is B.'s guardian and does the same thing. In all these instances a trust in the property will result to B., which trust equity will enforce in B.'s favor. This rule applies to both real and personal property.

2. *Where there is a voluntary conveyance without any consideration, and it appears that the grantee was not intended to take beneficially.*—Formerly the law would presume that a man would not part with his property without value received of some kind, and a resulting trust to the original holder was always held to arise out of such a transaction. "But the true rule now seems to be that where the instrument is perfectly executed and intended to operate at once, no resulting trust for the grantor will arise from the mere

fact that the transaction is a voluntary one, unless there are other circumstances which tend to show that the grantee was not intended to take beneficially." Bisp. Eq., sect. 90.

3. *Where there is a disposition of the property on trust, but no trust is declared, or is only partially declared, or wholly or partially fails.*— On this point see *Mayor of Gloucester v. Wood*, *post*.

*FAILURE OF TRUST.***MAYOR OF GLOUCESTER v. WOOD.**

[3 Hare, 131; 1 H. L. Cas. 272.]

James Wood, Esq., of Gloucester, was a very rich man, and a very public-spirited citizen. When his will was read, it was found that he had in a very munificent manner, left the sum of £200,000 to his native city “for” (so the will read) “the purpose I have before named.” Unfortunately, however, for the citizens of Gloucester, nowhere among the deceased gentleman’s papers could any mention of, or bequest to, the city be found. The city, however, laid claim to the £200,000, but was unsuccessful, the court holding that the money being devised upon trust, and *no trust being declared*, it must result to the testator’s estate.

Where a voluntary disposition of property, by deed or will, is made to a person as trustee, and the trust is not declared at all, or is ineffectually declared, or does not extend to the whole interest given to the trustee, or it fails wholly or in part by lapse or otherwise, the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself or his heir at law, or next of kin, as the case may be. Hill on Trustees, 113. This rule, it should be noted, does not apply to a disposition based upon a valuable consideration.

So, where the gift is made upon trusts which are effectively declared, but which do not exhaust the whole interest conveyed, the residue will result to the donor or his heirs. But a distinction should be observed between a gift to a person for a particular purpose, which does not exhaust the interest, and a gift of the same

interest subject to a particular charge. Thus, A. devises to B. the sum of \$1,000, and charges this sum with the payment of his debts. If the debts amount to but \$500, the balance goes to B., and does not result to A.'s estate.

A very important exception to the rule, that if the trust is not sufficiently declared, the gift will fail and become a resulting trust, exists in the case of charitable trusts. See next case.

CHARITABLE TRUSTS—THE “CY PRES” DOCTRINE.

JACKSON v. PHILLIPS.

[14 Allen, 571.]

Francis Jackson, of Boston, some time before the civil war, bequeathed a considerable sum of money to William Lloyd Garrison, Wendell Phillips, and others as trustees, “to use for the preparation and circulation of books, newspapers, the delivery of speeches, and such other means, as in their judgment will create a public sentiment that will put an end to negro slavery in this country.” Another sum he likewise left to trustees, “for the benefit of fugitive slaves, who may escape from the slave-holding States.” Mr. Jackson did not live to read President Lincoln’s Emancipation Proclamation, or the Thirteenth Amendment; before the litigation over his will was terminated, slavery was abolished in the United States. It being no longer possible that the money could be applied to these purposes, the trust, if it had been a private one, would have lapsed. But because it was a charitable trust, the court held that it would carry out the testator’s intention as nearly as possible, and ordered that the first fund should be paid to the New England Branch of the American Freedmen’s Union Commission, and that the second sum should be applied to the

use of needy persons of African descent, in the city of Boston, preference being given to such as had escaped from slavery.

"A charity," said Chief Justice GRAY in the above case, "being a trust in the support and execution of which the whole public is concerned, and which is, therefore, allowed by the law to be perpetual, deserves and often requires, the exercise of a larger discretion by the court of chancery than a mere private trust. * * * It is accordingly well settled, by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards either by change of circumstances, the scheme of the testator becomes, impracticable, or by change of law becomes illegal, the fund having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible to carry out his general charitable intent."

This is known to lawyers as the *cy pres* (as near as) doctrine, and is an important exception to the general rule, that one of the requisites to the creation of a valid trust is certainly in the object to be benefited.

*CONSTRUCTIVE TRUSTS — VENDOR'S LIEN
FOR PURCHASE MONEY.*

[A constructive trust, as distinguished from express and implied trusts, is one which is raised by construction of equity, quite independent of any actual or presumed intention of the parties, or any fraudulent intention on their part.]

MACKRETH v. SYMMONS.

[15 Ves. 329; 1 Wh. & Tud. Ld. Cas. Eq. 289.]

A person conveys land by a deed, which recites that the purchase money is all paid, or contains a receipt for the purchase money. As a matter of fact the purchase money is not paid. This case decides : —

1. That the vendor has a lien on the property for the unpaid purchase money.

2. That a vendor's lien for unpaid purchase-money, unless relinquished, exists against all persons, except purchasers for valuable consideration without notice, having the legal estate.

3. That another security taken and relied on may, according to its nature and the circumstances under which taken, be evidence of relinquishment, but the proof is on the purchaser.

A vendor's lien may be defined as that hold or charge on property which a person has who has sold the same, but has not received the purchase-money, or the whole of it. This lien exists even though the deed expresses that the consideration is paid and a receipt is in-

dorsed on it. It must be borne in mind that (as decided in the above case) the taking of a security is only an evidence of relinquishment by the vendor of his lien; and, as a general rule, the taking of a mere personal security, *e.g.*, a bill of exchange or promissory note, will not deprive the vendor of his lien, unless, indeed, there was a plain intention to substitute it for the lien, though, if he take a totally distinct and independent security, such as a mortgage, the lien is usually lost. *Indermaur Ld. Cas. Eq. 60.* The test is, was the security intended to be substituted for the purchase money, or was it taken as a mere cumulative security?

The vendor's lien binds the estate in the hands of the following individuals:—

1. The purchaser himself, and his heirs, and all persons taking under him or them as volunteers, *i.e.*, without paying a valuable consideration.

2. Subsequent purchasers for valuable consideration who have notice of the purchase money remaining unpaid.

In like manner the vendee of property has a lien on it after he pays the purchase-money and before the estate is conveyed to him.

A vendor's lien is by some writers classified as a constructive trust, and by others as an implied trust. It is not a particularly good instance of either, for whilst it may on the one hand be fairly said to be raised simply by construction of equity to satisfy the demands of justice, yet on the other hand it seems equally correct to say that it is founded on an implied intention.

As to constructive trusts, when a trustee purchases trust property, see the next two cases.

*SAME — PURCHASES BY TRUSTEES.***KEECH v. SANDFORD.**

[Sel. Cas. Ch. 61; 1 Wh. & Tud. Ld. Cas. Eq. 46.]

The most valuable of the worldly goods which Keech, Sr., left to his son and heir was the lease of Rumford Market. This son and heir, being an infant, Keech, Sr., bequeathed the lease to his friend Sandford, to hold in trust for said son and heir. The time came when the lease was about to expire, and Sandford applied to the lessor for a renewal of the lease for the benefit of the infant; but the lessor, not wishing to have any dealings with infants, whose contracts are not always binding, refused to renew it. Then it was that a happy thought struck Sandford: "If young Keech can not have the lease, why can not I? I have certainly done my duty in asking it for him. Now, it seems to me that I am not doing anything wrong in getting it for myself, if I can." He got it for himself, but when the son and heir heard of it, he brought a suit against Sandford to have the lease assigned to him, and was successful. The court held that a trustee can not act or contract for his own benefit in regard to the subject of the trust, and that the advantage of all that he does about the trust property accrues to the *cestui que trust*, if the latter desires it. "Though there was no fraud on Sandford's part, he should rather have let the lease expire than to have had the

lease to himself. This may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed ”

FOX v. MACKRETH.

[2 Bro C. C. 400; 2 Cox, 320; 1 Wh. & Tud. Ld. Cas. Eq. 115.]

Mr. Mackreth being a trustee for one Fox of certain property, agreed to buy it from him for the sum of £39,500, and Fox, being rather hard up, was glad to consent, and signed the deeds conveying his property to Mackreth. Fox was quite pleased when he pocketed the money, and continued to think he had done a good stroke of business until he learned that Mackreth had subsequently sold the very same property to a Mr. Page for £50,500. Then Fox was wroth, and filed his bill in chancery, claiming that he was entitled to the little profit which Mackreth had made so easily. He got it, the court deciding that Mackreth having purchased the estate from his *cestui que trust* while the relation of trustee and *cestui que trust* continued to subsist between them, and without having communicated to Fox the value of the estate purchased by him, he must be declared a constructive trustee for the benefit of Fox, as to the profit produced by the sale to Page.

Both these cases are based on the rule that a trustee must not make any profit out of his trust. Formerly, in England, this rule was carried so far as to prevent a trustee from recovering anything for his trouble and responsibility in the care and management of

the trust estate. *Robinson v. Pett*, 3 P. Wms. 132; 2 Wh. & Tud. Ld. Cas. Eq. 207. But this rule has in more modern times been relaxed, and trustees and other fiduciaries in this country are entitled to a compensation for their services. In fact, the experience of the average layman at the present day is that the old rule has been reversed, and, whereas, formerly the *cestui que trust* used to get everything and the trustee nothing, the former now gets nothing, and the latter everything. This new favorite of courts of equity is usually styled a "receiver,"—a very appropriate description.

Nevertheless, trustees (and the rule extends to all in a fiduciary position, such as executors, attorneys and agents) must not do anything inconsistent with the relation they occupy, as *Keech v. Sandford* abundantly shows. If they do, the profit they make will be held by them as a constructive trust for the benefit of the *cestui que trust*.

The ground of the decision in *Fox v. Mackreth* was not that Mackreth had purchased the property from Fox at an undervalue, but that he had purchased it from him while the relation of trustee and *cestui que trust* continued to subsist between them, and without having communicated to Fox the knowledge of the value of the estate which he had acquired as trustee; for if the relation of trustee and *cestui que trust* had been clearly dissolved, and Mackreth had made Fox fully acquainted with the knowledge which he had acquired of the value of the property, the purchase would not have been set aside. A trustee can purchase from a *cestui que trust* who is *sui juris*, and has discharged him from all the obligations which attached to him as trustee; but even then, any such transaction will be viewed by the court with jealousy, and the trustee must show that there is a clear and distinct contract, ascertained to be such, after the fullest examination of all the circumstances, that the *cestui que trust* intended the trustee should buy, and that there is no fraud, concealment, or possible advantage taken by the trustee of any information acquired by him in his character of trustee." Snell's Eq. 473.

PURCHASES FROM TRUSTEES.

ELLIOT v. MERRYMAN.

[Barnard. Ch. 78; 1 Wh. & Tud. Ld. Cas. Eq. 64.]

Thomas Smith devised his real and personal estate to his friend, Goodwin, in trust (or charged with), the payment of his debts and legacies. Goodwin sold most of the realty and personalty to Merryman, and received the consideration from him; but neglected to apply it to the payment of Smith's debts. The latter's creditors did not like this sort of thing, and as Goodwin was a man of straw they sought to follow Smith's lands into Merryman's hands, on the ground that Merryman, purchasing from a trustee, was bound to see to the application of the purchase money. But in this contention they were unsuccessful. The court held: —

1. That where real estate is devised to trustees upon trust to sell for payment of debts generally, or charged with payment of debts, the purchaser is *not* bound to see that the money is rightly applied.

2. That where real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied in payment of those debts.

3. That a purchaser of leasehold or other personal estate is never liable to see to the application of the purchase money — except in cases of fraud — because

the executors are the proper persons that by law have the power to dispose of a testator's personal estate.

The *cestui que trust* was so great a favorite with courts of equity that they sought by every means to protect him against the fraud of the trustee. Therefore they held, that where he was mentioned in the devise as a beneficiary, the purchaser of trust property from the trustee was bound to see that the money was properly applied in accordance with the trust. This doctrine, however, was a few years ago repealed in England by Parliament — for it was found to bear too hard on purchasers, and to unduly hamper the transfer of property. The statute of 22 and 23 Vict. c. 35, sect. 23, provides as follows: —

“The *bona fide* payment to, and the receipt of, any person to whom any *purchase or mortgage money* shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.” It is also enacted, by 23 and 24 Vict. c. 145, sect. 29, as follows: “The receipts in writing of any trustees or trustee for any money payable to them or him, by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.”

In the United States, the equitable doctrine of seeing to the application of the purchase money was never favored, and the distinction between trusts for the payment of debts generally, and for the payment of particular debts is not recognized. The purchaser in this country is *not* bound to see to the application of the purchase money; and is not responsible for its misapplication in the absence of fraud.

RESPONSIBILITY FOR ACTS OF CO-TRUSTEE.

TOWNLEY v. SHERBORNE.

[Bridg. 35; 2 Wh. & Tud. Ld. Cas. Eq. 860.]

A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents for the first year and a half, and signed acquittances therefor, but from that period the rents were uniformly received by an assignee of C. The liability of A. and B. during the first year and a half was not disputed; but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands. After long and mature deliberation the judges resolved:—

1. That where lands are conveyed to two or more on trust, and one of them receives the profits, his co-trustees shall not be charged therefor, unless there has been fraud in the matter, for they being joint tenants or tenants in common, any one of them may, by law, receive all of the profits.

2. That where there was any fraud or evil intent in the trustees permitting one to receive the whole profits, the others should be charged, though they received nothing.

BRICE v. STOKES.

[11 Ves. 319; 2 Wh. & Tud. Ld. Cas. Eq. 877.]

In this case the question was, whether a trustee should be charged with certain purchase money which, though he had joined in the receipt, had been received by his co-trustee. The court held, that under the particular circumstances of the case, he was liable to be charged, the sale being unnecessary, and he permitting his co-trustee to keep and act with the money contrary to the trust; but that he should not be charged in respect of the interest of one of the *cestui que trust* who had notice of the breach of trust and acquiesced therein.

The court laid it down that there is this great distinction between trustees and executors, viz., that, though where trustees or executors join in a receipt, *prima facie* all are presumed or considered to have received the money, yet it is competent for a *trustee* to exonerate himself by showing that the money acknowledged to have been received by all, was, in fact, received by one, and the other joined only *for conformity*; but an *executor* cannot do this, for it is not necessary for him to join in the receipt (as it is in the case of a trustee), and therefore if he does join, he is to be considered as assuming a power over the fund, and therefore answerable.

From the two preceding cases, it will be seen that as a *general* rule a trustee is not responsible for the conduct of his co-trustee. But any fraud or improper dealing, or gross negligence on his part will render him responsible, as for example, if he were to stand

by and see a breach of trust committed by his co-trustee, or if he permits him to deal with the trust money contrary to the trust. Where there are several trustees they should all concur in the business of the trust. In the matter of public trusts, however, a majority may act and bind the others.

As to the duties and responsibilities of trustees, see *Keech v. Sanford*, and *Fox v. Mackreth*, *ante*.

*WILLS.***ASHBURNER v. MACGUIRE.**

[2 Bro. C. C. 108; 2 Wh. & Tud. Ld. Cas. Eq. 267.]

In September, 1778, Mr. Macguire made his will. Among other things he bequeathed to William Beawes, a natural child of his, at that time at school, "my capital stock of £1,000 in the East India Company stock." Mr. Macguire at this time was possessed of £1,000 in East India stock, but before his death sold it all out. William insisted that, notwithstanding this, he ought to receive that much from his father's estate, but Mr. Macguire's representatives did not see it in that light, and when he went to court about it, the Lord Chancellor decided that he was not entitled to anything, as the bequest being of a specific thing, its alienation by the testator extinguished the son's claim.

BLAND v. MAYO.

[4 Md. Ch. 484.]

Even Chancellor Bland, of Maryland, could not make a will clear enough to satisfy his heirs without going into court to find out their rights under it. He

had made three different devises of his property. 1. He devised "all his property, real and personal, except his Bland Air estate," to his wife. 2. He devised his Bland Air estate to his daughter. 3. He devised all his books, historical and biographical, and Rees' Encyclopædia, to his son-in-law, Capt. Mayo. It happened that the Chancellor left some debts, and the question was out of whose legacy should they be paid.

The court decided that the debts must come out of the devise to his wife, which must be exhausted before they could resort to the daughter's and the son-in-law's bequests.

SMITH v. LAMPTON.

[8 Dana, 69.]

Martin Smith, of Kentucky, bequeathed to his three sons \$500 each, and to his daughters \$250 each, "in bank notes of the Bank of Kentucky out of moneys of that description now in my hands;" and directed his executor to invest the same in land for the use of the legatees. On the day the will was made he delivered to the executor notes of the Bank of Kentucky to the amount of the legacies to the boys, which the executor invested for them. But he delivered none for the girls, and at his death he was not the owner of any notes of the Bank of Kentucky.

Under these circumstances, if this were a specific legacy, it was clear that, according to the rule in *Ashburner v. Macguire*, the disposal by Martin of all the notes he had for the benefit of the boys was an ademp-

tion of the legacies to the girls, and those legacies, therefore, failed. But one of the girls brought a suit in chancery for her share, and was successful, on the ground that this was not a *specific*, but a *demonstrative* legacy. "A bequest," said the court, "of a certain sum of money 'out of,' or 'to be paid out of,' a designated fund, or note, or bond, or a bequest of stock 'out of' a greater amount of the like stock, has been generally considered as a demonstrative legacy pledging a particular fund as a collateral security, and being as to that security merely directory, but not depending for its validity or value on the sufficiency or existence of the fund thus especially dedicated for securing it."

Bequests or legacies are classed under three heads: (1) *general*, (2) *specific*, and (3) *demonstrative*.

1. A general legacy is one which does not amount to a bequest of any particular thing as distinguished from all others of the same kind; *e.g.*, if Mr. Bonner, of the New York *Ledger*, were to bequeath to his friend and contributor, Henry Ward Beecher, a horse, this would be a general legacy. A general legacy is sometimes termed a "pecuniary" legacy.

2. A specific legacy is a bequest of a particular thing or sum of money, or debt, as distinguished from all others of the same kind; *e.g.*, Mr. Bonner bequeaths his horse Dexter, — this is a specific legacy.

3. A demonstrative legacy is one which is in its nature a general legacy, but there is a particular fund pointed out to satisfy it; *e.g.*, Mr. Bonner bequeaths "a horse out of my stable," this is a demonstrative legacy.

A man was once asked his occupation, and he answered that he was a legatee — a rather pleasant situation to occupy as things go. But there is a considerable choice between the three kinds of legacies just mentioned. The trouble about a general legacy is that if, after the payment of the testator debts, there are not sufficient assets to pay all the legacies, a general legacy will abate, but a specific legacy will not; *i.e.*, the party who is fortunate enough to be enti-

tled to a specific bequest must be first paid in full, and the general legatee will have to be satisfied with what is left, even though it is only one per cent of the amount of his legacy. This was the reason that it was held that Chancellor Bland's son-in-law and daughter should take their bequests free of the testator's debts — theirs were specific bequests.

On the other hand, a specific legacy has its drawbacks, for if the testator should happen to alienate the property during his lifetime, or if the thing that he has devised cannot be found at his death, the legatee will not be entitled to anything out of the testator's general estate — because nothing but the specific thing can be given to him. This was the trouble with William Beawes's legacy. So if, in the illustration given above, Mr. Bonner should sell Dexter, or the horse should be killed, before his death, the legatee would get nothing.

On the whole, the position of a party entitled to a demonstrative legacy is the best. This kind of a legacy has the advantages of both the others without the drawbacks to either. It is so far in the nature of a specific legacy that it must be paid first, and any deficiency of assets must fall on the general legacies; and it is so far like a general legacy that the alienation or non-existence of the property pointed out as the means of satisfying it does not extinguish it. Thus, in Mr. Bonner's bequest of a horse out of his stable, Mr. Bonner might sell his entire stable before he died, yet the legatee could call on the executor to buy him a horse.

*DONATIO MORTIS CAUSA.***WARD v. TURNER.**

[2 Ves. 431; 1 Wh. & Tvd. Ld. Cas. Eq. 905.]

In the household of old William Fly, lived John Mosely, a poor relation, who was glad enough to act as a sort of body servant to his richer relative. William Fly was one day taken very ill, and expecting to die, said to his retainer, “ Mosely, I give you all the goods and plate in this house.” Then going to his desk, he took from it three papers and said, “ I give you, Mosely, these papers, which are receipts for South Sea Annuities, and will serve you after I am dead.”

William Fly died, and Mosely filed a bill in chancery claiming the goods and the stock as a *donatio mortis causa*. But he did not succeed, for the court held that to a valid gift of this kind delivery was necessary; that the goods and plate had never been delivered, and that the delivery of the receipts was no sufficient delivery of the stock.

A *donatio mortis causa* is a gift made in such a state of illness or expectation of death, as warrants a supposition that it was made in contemplation of that event. Such a disposition of property occurs often when a man, who has put off making his will, finds that he has not time to execute so formal a document, or is too far gone even to sign his name. To a valid gift of this kind there are four essentials.

1. *It must be made in expectation of death.* — The danger of death must be close at hand. A Pennsylvanian enlisted for the war in

1861, but before he went to the front handed a friend an envelope containing notes due him, to give to his sweetheart. Four months after he died in the army; yet, it was held that this was not a good *donatio causa mortis*, because not made in his last sickness or in stress of illness or present peril. *Gourley v. Linsenbigler*, 51 Pa. St. 345. But a gift made during extreme illness is presumed to be made in expectation of death.

2. *It must be made on condition that it is to be absolute only in case of the donor's death.* — If the donor recover from his illness, the gift is defeated; and therefore, if his intention is that it shall be absolute, and not recoverable by his own act by recovery from illness, it is not a good *donatio mortis causa*. In an English case the obligee of a bond, five days before her death, signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond *without consideration* to a person to whom the bond was, at the same time, delivered. The court, having decided that the transaction being incomplete as a gift *inter vivos*, it could give the volunteer no relief, he tried to claim it as a *donatio mortis causa*. But here again the court decided against him. "In order to be good as a *donatio mortis causa*," said the judge, "the gift must have been made in contemplation of death, and intended to take effect only after the donor's death. If it appeared, however, from the circumstances of the transaction, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causa*." *Edwards v. Jones*, 1 Mylne & Cr. 226.

3. *There must be a delivery of the subject of the gift to the donee for his own use.* — A good *donatio mortis causa* of a personal chattel, is made by delivering it into the hands of the donee or his agent. But a delivery to the donor's agent is not enough. In *Ward v. Turner*, a symbolical delivery (the receipts for the stock) was held insufficient; but it has been held that the delivery of the key of a box is sufficient to carry its contents. *Jones v. Selby*, Prec. in Ch. 300. And where the thing is a *chose in action*, delivery of some document essential to its recovery is enough. *Moore v. Darton*, 4 DeG. & Sm. 519.

4. *The donor must part with all dominion over the gift.* — An early English case is a good illustration of this rule. A., being very ill, ordered a box, containing wearing apparel, to be carried to B.'s house to be delivered to B. Next day B. brought the key to A., who desired it to be taken back, saying that he should want a pair

of pants out of it. "In the case of a *donatio mortis causa*," said the court, "possession must be immediately given; and also in parting with the possession it is necessary that the donor should part with the dominion over it. It seems rather to have been left in B.'s care for safe custody, and was so considered by her." *Hawkins v. Blewitt*, 2 Esp. 663.

Equity does not look on gifts of this kind with favor, avoiding, as they do, the formalities requisite to a valid will of property, or a gift *inter vivos*, and opening so wide a door to fraud in their proof. The evidence to support a *donatio mortis causa* must, therefore, be full and explicit. In New York, some years ago, one who had nursed a dying man produced his watch, and claimed to have received it as a gift of this kind. But this did not go down with the court, for they held that he could not rely on possession of the watch as evidence of delivery, but must produce a disinterested witness of the transaction, else he could not keep the time-piece. *Sneckner v. Taylor*, 1 Redf. 427.

A *donatio mortis causa* is something like a legacy, and something like a gift *inter vivos*. It resembles a legacy in these respects, viz.: (1.) It is revocable during the donor's lifetime. (2.) It may be made at law to the donor's wife. (3.) It is liable to the debts of the donor on a deficiency of assets. It resembles a gift *inter vivos* in these respects, viz.: (1.) It takes effect from the delivery in the donor's lifetime. (2.) It requires no assent on the part of the executor or administrator to perfect its title.

*CONVERSION—“EQUITY LOOKS ON THAT AS
DONE WHICH OUGHT TO BE DONE.”*

FLETCHER v. ASHBURNER.

[1 Bro. C. C. 497; 1 Wh. & Tud. Ld. Cas. Eq. 826.]

John Fletcher made a will by which he devised his real estate to trustees, to sell the same after his widow's death, and divide the proceeds between his son and daughter. The son and daughter, however, both died in the widow's lifetime, and the latter, as the son's next of kin, became entitled to the property, if it were to be considered personalty. On the other hand, the son's heir-at-law claimed this share as realty, for the reason that it had never been sold by the trustees. But the court held that this did not matter; that it is an established principle of equity that money directed to be employed in the purchase of land and land directed to be sold and turned into money, are to be considered as that species of property into which they are to be converted; and, therefore, in this case, the real estate having been ordered to be sold, it became personalty (even although it had not been sold) and went accordingly.

The doctrine of conversion which this case turned on forms the best illustration of the maxim, "Equity looks on that as done which ought to be done." Property is directed to be converted; it is the donor's intention that it should be so, and equity treats his intention as carried out, even though actually not so. Conversion is de-

defined as "that change in the nature of property by which for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendable as such." To effect a conversion it is necessary that the direction to convert be imperative and *not* optional, and a direction to convert at the request of certain parties will be held imperative unless it is inserted for the purpose of giving a discretion to those parties.

Following the doctrine of conversion comes that of reconversion, which has been defined as "that notional or imaginary process by which a prior constructive conversion is annulled and taken away." Snell, Eq. 203. Thus land is given upon trust to sell and pay the proceeds absolutely to A., and conversion here takes place; but A. can say he prefers the land and will take the land — this is reconversion. If there are several persons interested in the subject matter the question arises, can one reconvert without the consent of the other or others? — that is to say, firstly, land is directed to be sold and the proceeds paid to A. and B.; and secondly, money is directed to be laid out in the purchase of land for A. and B.; in these cases can A. elect to take his share in its original quality, that is, can he reconvert without B.? The answer is, that in the first case he cannot, but in the second he can. Snell, Eq. 205.

ACKROYD v. SMITHSON.

[1 Bro. C. C. 503; 1 Wh. & Tud. Ld. Cas. Eq. 872.]

“Lord Eldon’s fortune,” says Lord CAMPBELL, in his “Lives of the Chancellors,” “was made by Ackroyd v. Smithson.” Less than a month before the death of this great lawyer, a friend, dining with him, asked his host to relate to him the incidents connected with its argument and decision. “I will,” said Lord ELDON. “Come, help yourself to a glass of Newcastle port, and give me a little. You must know that the testator in that cause had directed his real estate to be sold, and after paying his debts, and funeral and testamentary expenses, the residue of the money to be divided into fifteen parts, which he gave to fifteen persons whom he named in his will. One of these persons died in the testator’s lifetime. A bill was filed by the next of kin, claiming, among other things, the lapsed share. A brief was given me to consent for the heir-at-law upon the hearing of the cause. I had nothing then to do but to pore over this brief. I went through all the cases in the books, and satisfied myself that the lapsed share was to be considered real estate, and belonged to my client, the heir-at-law.

“The cause came on at the Rolls before Sir THOMAS SEWELL. I told the solicitor who sent me the brief that I should consent for the heir-at-law, so far as regarded the due execution of the will, but that I must support the title of the heir to the one-fifteenth which

had lapsed. Accordingly, I did argue 'it and went through all the authorities. When Sir THOMAS SEWELL went out of court he asked the Register who that young man was. The Register told him it was Mr. SCOTT. 'He has argued very well,' said Sir THOMAS SEWELL, 'but I cannot agree with him.' This the Register told me. He decreed against my client. The cause having been carried by appeal to Lord Chancellor THURLOW, a guinea brief was again brought me to consent. I told my client if he meant by consent to give up the claim of the heir to the lapsed share, he must take his brief elsewhere, for I would not hold it without arguing that point. He said something about young men being obstinate, but that I must do as I thought right. You see the lucky thing was there being two other parties, and the disappointed one not being content, there was an appeal to Lord THURLOW. In the meanwhile, they had written to Mr. Johnston, Recorder of York, guardian to the young heir-at-law, and a clever man, but his answer was: 'Do not send good money after bad. Let Mr. Scott have a guinea to give consent, and if he will argue let him do so, but give him no more.' So I went into court, and when Lord THURLOW asked who was to appear for the heir-at-law, I rose and said modestly that I was, and as I could not but think (with much deference to the Master of the Rolls, for I might be wrong), that my client had the right to the property, if his lordship would give me leave, I would argue it. It was rather arduous for me to rise against all the eminent counsel. I do not say that their opinions were against me, but they were employed against me. However, I argued that the testator had ordered this

fifteenth share of the property to be converted into personal property for the benefit of one particular individual, and that, therefore, he never contemplated its coming into possession of either the next of kin or the residuary legatee, but being land, at the death of the individual it came to the heir-at-law.

“ Well, THURLOW took three days to consider, and then delivered his judgment in accordance with my speech, and that speech is in print and has decided all similar questions ever since.”

The case of *Ackroyd v. Smithson* is sometimes confused by students with that of *Fletcher v. Ashburner* as simply deciding the doctrine of conversion. But *Ackroyd v. Smithson* is, of course, quite beyond the doctrine of conversion, and forms an instance of a resulting trust, showing that where the purposes of the conversion fail there the property shall remain and go in its original state; thus if a testator devises to trustees to sell and divide the proceeds between two persons, and they die during the testator's lifetime, the property remains in its original state, and if only one of the parties dies, as to his moiety there will be no conversion, but it will go according to its original quality, and the principle of this is, that where an estate is converted merely *for a particular purpose*, and that fails, the court will not infer an intention to convert for any other purpose.

Ackroyd v. Smithson is only on the point of a resulting trust in the case of real estate directed to be sold, and it was at first doubted whether the rule there established applied to the case of *money* directed to be laid out in the purchase of land to be settled upon trusts which either wholly or partially failed, but it has now long been decided that it does so apply. *Indermaur Ld. Cas.* Eq. 119.

*ELECTION.***WILBANKS v. WILBANKS.**

[18 Ill. 17.]

The first wife of R. A. D. Wilbanks, of Illinois, owned forty acres of land when she died, leaving children. Wilbanks married again, and likewise went over to the majority, leaving a son by his second wife, and devising to his second wife and his son these forty acres; and to the children by the first wife he left, by the same will, certain legacies. Of course, Wilbanks had no power to make the devise as to the forty acres, for it belonged to his first wife's children. So they brought an action against wife No. 2 and son to recover the property. But the court decided that they must either relinquish their claim to the legacies or to the forty acres, — they could not have both; they must elect which one benefit they would take.

“In the general language of the authorities,” said SCATES, C. J., “they may not at the same time take under the will and contrary to it.”

BRODIE v. BARRY.

[2 Ves. & B. 127.]

John Brodie bequeathed to his niece, Betty, a part of his estate situated in England and Scotland. To his

nephews and other nieces he also left shares of his property in both countries, but this will was so badly drawn that on his death it was found that the property in Scotland did not pass under it, but went to Betty, who was his heir at law, according to the law of Scotland. The other legatees very naturally objected to her taking the whole of the Scotch property, and also her share of the English property under the will, and the question arose whether she should be allowed both to take the benefits given to her by the will and the property, which being thus informally dealt with, descended to her as heir at law, or whether she should be put to her election.

The court of chancery held that the Scotch heiress could *not* take both the benefits given her by the will and the property which, being informally dealt with, would descend to her; but that she must elect between them.

COOPER v. COOPER.

[L. R. 7 H. L. Cas. 53.]

The proceeds of an estate being given in trust as one Mrs. Cooper should appoint, she appointed the same to her three sons, her executors, etc., equally, subject to a power of revocation by deed. She never exercised this power of revocation; but by her will and codicils, treating herself still as having a disposing power over the said property, she gave it absolutely to the eldest of the three sons, and gave other benefits to the children of the second son (he having in the meantime died, leaving children), and also to the third son. This suit was brought to compel the third son and the

children of the second son to elect between taking under the settlement or under the will and codicils. There was no contention as to the third son, who admitted that he must elect; but the children of the deceased son objected to elect, on the ground that they, taking their parents' interest under the Statute of Distributions as next of kin, their rights were of an undefined and intangible interest, and not the subject of election.

But the court thought otherwise, holding that the Statute of Distributions is nothing but a will made by the Legislature for an intestate, and that (subject to the claims of creditors) the title of the next of kin is substantial and complete, and that the rights of these children of the second son was exactly the same as were the rights of the third son, and that they must elect.

The doctrine of election originates in inconsistent or alternative donations, and it consists in the choosing by a person between two rights, where there is an intention expressed or implied that they shall not both be enjoyed. It rests upon the equitable grounds that no man should be allowed to claim inconsistent rights, and that any one who sets up an interest under an instrument is bound to give full effect to the document; he cannot enjoy one part of the provisions which is to his liking, and reject another part which is not to his liking.

Election may be express or implied. "An express election," says Mr. BISPHAM, "is where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms upon which the gift alone can be enjoyed. Thus if a testator were to say, in so many words, that a legacy given by his will should only go to the legatee, upon the stipulation that the latter should convey a piece of land, which was his own, to a third party, here would be an express condition, and the legatee would have to choose or elect between the legacy and the land." Bisph. Eq. 296. On the other hand, suppose A., by will or deed, gives to B. property belonging to C., and by the same instrument, gives other property belonging

to himself to C. A court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his conforming to all the provisions of the instrument, by renouncing the right of his own property in favor of B. C. must consequently make his choice, and this is a case of an implied election.

Where a person elects against the instrument, *i.e.*, refuses to give up his own property, he does not always absolutely forfeit the benefits given him by it, but only so much of it as will compensate the other party. Thus, if A. gives B. \$1,000 and C. a small house of small value, to which B. is entitled, and B. refuses to conform to the testator's will, he is only bound to give up so much of the \$1,000 as the house is worth, so as to compensate C.

Cooper v. Cooper is a recent case of great importance, deciding as it does, that persons taking interests under a statute of distribution, are subject to the doctrine of election in the same way as those through whom they claim would have been.

PERFORMANCE — “EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION.”

WILCOCKS v. WILCOCKS.

[2 Vern. 558; 2 Wh. & Tud. Ld. Cas. Eq. 389.]

The plaintiff's father, upon his marriage, covenanted to purchase lands of the value of £200 per annum, and settle the same upon himself for life, and to his first and other sons after his death. He purchased lands of that value, but made no settlement of them, and they descended to the plaintiff as heir at law. The plaintiff was not satisfied with this, but asked for a specific performance of the covenant out of his father's personal estate. He was not successful, for the court decided that the lands which descended to him must be taken as a performance of the covenant.

BLANDY v. WIDMORE.

[1 P. Wms. 323; 2 Wh. & Tud. Ld. Cas. Eq. 391.]

A husband, previous to his marriage, promised by deed to leave his intended wife £620, if she should survive him. The marriage took place and the hus-

band died intestate, but the wife's share, under the Statute of Distributions, far exceeded £620.

The Chancellor held that the wife was *not* entitled to have the £620 *and* her distributive share, but the distributive share must be taken as a satisfaction or performance of the covenant. "I will take this covenant," said the Chancellor, "not to be broken, for the agreement is to *leave* the widow £620. Now, the intestate in this case has left his widow £620 and upwards, which she, as administratrix, may take presently upon her husband's death; wherefore let her take it; but then, it shall be accounted as in satisfaction of and to include in it her demand by virtue of the covenant, so that she shall not come in first as a creditor for the £620, and then for a moiety of the surplus."

OLIVER v. BRICKLAND.

[1 Ves. sr. 1; 3 Atk. 420.]

A husband covenanted to pay his wife a certain sum *within two years after his marriage*, and if he died his executors should pay it. He lived after the two years, but died intestate and without paying the sum promised to his wife. But his wife's distributive share was larger than the sum covenanted for. Nevertheless, it was held that the widow was entitled both to the money under the covenant and to her distributive share of the residue. There was a breach of the cove-

nant before the death of the husband, and from the moment of the breach a debt accrued to the wife.

The doctrine of performance is founded on the maxim of equity: Equity imputes an intention to fulfil an obligation, *i.e.*, when a person covenants to do an act, and he does some other act that is capable of being applied towards a performance of this covenant, he will be presumed to have had the intention of performing his covenant when he did the other act. Snell, Eq. 232. The cases arising under this rule are divisible into two classes.

1. *Where there is a covenant to purchase and settle lands, and a purchase of lands is made, but is not expressed to be in pursuance of such covenant, and no settlement of them is made.* — *Wilcocks v. Wilcocks* decides what will be the effect of this — the purchase of the lands and their descent by law to the covenantee will be deemed a performance of the covenant. In *Wilcocks v. Wilcocks* it will be seen that the lands there purchased were of equal value with those covenanted to be settled; but it has also been decided that even where the lands purchased are of less value, they shall be considered as a part performance of the covenant. *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211. It should also be noted here that (1) where the covenant points to a *future purchase*, it will not be presumed that lands, of which the covenantor was then seized, were intended to be taken in performance of it, and (2) property of a different nature from that covenanted to be purchased, will not be presumed to be intended as a performance.

2. *Where there is a covenant to leave personal property, and the covenantee recovers a share under an intestacy.* — Two rules have been established as to this, *viz.*: —

(a.) Where the covenantor's death occurs *at or before* the time when the obligation accrues, the distributive share is a performance of the covenant. *Blandy v. Widmore* illustrates this.

(b.) Where the death occurs *after* the obligation accrues, the distributive share is *not* a performance. On this point see *Oliver v. Brickland*.

It should be mentioned that it has been decided that, although a distributive share on an intestacy will be taken as performance of a covenant, yet a gift by will of a sum of money as a residue will not so operate *per se*, because it imports bounty. And where the cove-

nant is not to pay a gross sum, but the interest of a sum of money for life or a mere life annuity, the principle upon which *Blandy v. Widmore* was decided does not apply. *Indermaur Ld. Cas. Eq. 105.*

SATISFACTION.

TALBOT v. DUKE OF SHREWSBURY.

[Prec. Ch. 392; 2 Wh. & Tud. Ld. Cas. Eq. 379.]

In this case it was decided that if a debtor, without taking notice of the debt, bequeaths a sum as great as or greater than the debt to his creditor, this is a satisfaction; but it is not a satisfaction if it is bequeathed on a contingency, or if the bequest is less than the debt.

CHANCEY'S CASE.

[1 P. Wms. 408; 2 Wh. & Tud. Ld. Cas. Eq. 380.]

An old gentleman who owed his maid-servant a matter of £100 for wages gave her a bond for that amount. The old gentleman died without paying the bond, but by his will he gave the maid-servant a legacy of £500 "for her long and faithful service," so his will read. The will also directed that all his debts and legacies should be paid.

The maid-servant claimed both the amount of the bond and the legacy, and the Chancellor decided that she should have both, on the ground that the legacy was not a satisfaction of the debt due on the bond. The court said that the testator, by the express

words of his will, had ordered that all his debts *and* legacies should be paid, and the £100 being a debt and the £500 being a legacy, it was as strong as if he had directed that both the bond and legacy should be paid.

STRONG v. WILLIAMS.

[12 Mass. 391.]

Mary Strong was Mr. Little's housekeeper, who gave her a bond for \$333 and a written promise to pay her \$20 a year. In his will he bequeathed her a general legacy of \$300, and a specific legacy of certain goods and chattels of the value of \$745. After Mr. Little's death, Mary brought a suit on the bond, and his executors argued that the legacies were a satisfaction of the debt.

But the court did not agree with them. The judges held that the general legacy was not a satisfaction of the debt, because it was *less than* the amount of the debt, and that the specific legacy was not a satisfaction because it was of a *different nature*. So Mary received her legacies and was paid the bond into the bargain.

HOOLEY v. HATTON.

[Bro. C. C. 390 n; 2 Wh. & Tud. Ld. Cas. Eq. 346.]

Lady Finch, by her will, gave her maid, Lydia Hooley, a legacy of £500, and afterwards, by a codi-

cil, a legacy of £1,000, and the question was whether the last legacy alone passed or the legatee should have both. The court held that Lydia was entitled to both legacies; but that if a legacy of the same amount is given twice for the same cause, and in the same instrument, and in the same, or nearly the same, words, then it will *not* be double; but where in *different* writings there is a bequest of equal, greater, or less sums, the legatee will be entitled to all of them.

EX PARTE PYE.

[18 Ves. 140; 2 Wh. & Tud. Ld. Cas. Eq. 365.]

This case is the leading authority for these rules:—

1. That where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and in consequence of the leaning against double portions, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy either wholly or in part; and this applies where a person puts himself *in loco parentis*.¹

2. But no such presumption arises in the case of a stranger or of a natural child, where the donor has *not* put himself *in loco parentis*, unless the subsequent advance is proved to be for the very purpose of satisfy-

¹ In the place of the parent.

ing the legacy ; and, therefore, the legatee will be entitled to both.

Satisfaction is defined as the giving by a person liable to some claim of the donee, of something different from the subject of such claim, but intended in substitution thereof. Performance (*ante*, p.48) appears at first sight to be the same as satisfaction, but a closer examination of the two doctrines will show that the distinction is obvious enough. That distinction has been stated to be that "satisfaction implies the substitution or gift of something different from the thing agreed to be given, but equivalent to it in the eye of the law, while in cases of performance the thing agreed to be done is in truth wholly or in part performed." The cases on the doctrine of satisfaction may be divided into four classes: —

- I. Satisfaction of debts by legacies.
- II. Satisfaction of legacies by subsequent legacies.
- III. Satisfaction of legacies by portions.
- IV. Satisfaction of portions by legacies.

I. *Satisfaction of debts by legacies.* — The general rule is as stated in *Talbot v. Duke of Shrewsbury*, that if a man, by his will, leaves a creditor a sum of money as great or greater than his debt, without saying anything about the debt, the legacy will be a satisfaction of the debt, and the creditor cannot take the legacy and then undertake to collect the debt. The maxim in such cases is *debitor non præsuntur donare*, that is to say a debtor is not presumed to be making gifts, he is rather paying his debts when he leaves a legacy to a creditor. But this presumption is not very strongly favored by the courts, and therefore it is not surprising to find several exceptions — six in all — where the bequest is held *not* a satisfaction of the debt. These are: —

(a.) Where the legacy is less than the debt. Here it will not go in satisfaction even *pro tanto*. *Strong v. Williams* illustrates this.

(b.) Where the debt was contracted subsequently to the making of the will. Here it is obvious the testator could have had no intention of making any satisfaction of what was not at the time in existence.

(c.) Where the will expressly directs that the debts *and* legacies shall be paid. This was the doctrine of *Chancey's* case.

(d.) Where the time fixed for the payment of the legacy is different from the time when payment of the debt is demandable. In a

well-known case (*Clark v. Sewell*, 3 Atk. 96), there was a legacy given to a creditor far exceeding the amount of the debt, but, by the will, all the legacies were directed to be paid one month after the testator's decease, and it was held that the fact of the legacies not being payable till after a month, prevented the satisfaction which would otherwise have taken place.

(e.) Where the legacy is contingent or uncertain.

(f.) Where the legacy is not of the same nature as the debt. The specific legacy in *Strong v. Williams* illustrates this exception.

II. *Satisfaction of legacies by subsequent legacies.* — Two classes of cases occur under this head, (a) where the legacies are by the same instrument, (b) where the legacies are by different instruments.

(a.) Where legacies of quantity are given by the same instrument *simpliciter* (i.e. without any expression of the motive of the gift), and are of equal amount, one only will be good. The leading American case on this point is *Dewitt v. Yates*, 10 Johns. 156. Here a father bequeathed \$250 to the children of his daughter, Maria, payable in sums of \$50 to each on coming of age, or marrying. By a subsequent clause of the same will, he devised one-half of one of his farms to his son-in-law, directing him to pay the children of his daughter, Maria, \$250, on each coming of age or marrying. Chancellor KENT decided that the second legacy was a mere repetition of the first, and that the children were not entitled to both. On the other hand, where the legacies are of unequal amount, they are considered cumulative.

(b.) Where legacies are given by different instruments to the same person *simpliciter*, the court considering that he who has given more than once means more than one gift, permits the legatee to take both. But to this rule there are two exceptions: —

(1.) If the same motive is expressed *and* the same sum given in both instruments, the legatee can only take one.

(2.) If the legacy is a specific thing the legatee can only take one, though it is given twice. Thus if A. by one will gives B. a certain ruby ring, and by a subsequent will also gives him the ruby ring, here, of course, there can be no repetition of the gift.

It is important to inquire whether extrinsic evidence can be given to show whether a testator intended a legacy to be by way of augmentation or as a repetition, as if so the rules laid down in the

above cases might often be altered. It is established on this point that where the court raises the presumption against double legacies, it will receive parol evidence to show that the testator actually intended the double gift he has expressed, for that but rebuts the presumption of the court, and supports the apparent intention of the will; but where the court raises no presumption, as where legacies are given by different instruments, it will not admit parol evidence to show testator only meant the legatee to take one, for that would be to contradict the will. *Indermaur Id. Cas. Eq. 100.*

III.-IV. *Satisfaction or more property ademption of legacies by portions, and satisfaction of portions by legacies.*—The case of *Ex parte Pye* lays down the law in these cases so clearly that little comment is needed here. It may be added, however, that it is important to remember the great difference that exists in satisfaction in the case of portions on the one hand, and in the case of legacies to creditors on the other; for in the first case, equity, leaning against double portions, is in favor of the satisfaction, so that where there is a legacy to or a settlement on a child, and a subsequent advancement on the marriage of such child, such advancement will be a satisfaction altogether, if of the same or a greater amount, and if of a less amount it will be a satisfaction *pro tanto*, but in the second case, as we have seen, it is just the opposite, for equity will take hold of any slight circumstance as in *Chancey's case*, or *Strong v. Williams*, to rebut the presumption of satisfaction that would otherwise arise.

The principle upon which the court leans against double portions is founded upon the idea that the parent or person *in loco parentis* fixes the amount of the portion or provision for the child, and that any benefit he afterwards gives is on account of the obligation which he would otherwise have discharged at his death, and this explains why the doctrine has no operation in the case of persons towards whom the testator occupied no such relationship.

Students are apt to get confused between cases of ademption and satisfaction, and the matter has been well explained thus: "When the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will. With reference to cases * * * of a previous settlement and a subsequent will * * * it is now quite settled that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the

will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases." *Coventry v. Chichester*, 2 H. & M. 159.

With regard to the admissibility of extrinsic evidence on the point of satisfaction, the rule against double portions is a presumption of law, and like other presumptions of law, may be rebutted by evidence of extrinsic circumstances. To vary or contradict the plain effect of a document where there is no presumption of law contrary to that effect, extrinsic evidence is not admissible; but to confirm the plain effect of a document, where there is a presumption of law contrary to that effect, extrinsic evidence is admissible. *Snell* Eq. 257-259; *Indermaur* Ld. Cas. Eq. 104.

ADMINISTRATION OF ASSETS.

DUKE OF ANCASTER v. MAYER.

[1 Bro. C. C. 454; 1 Wh. & Tud. Ld. Cas. Eq. 631.]

This case is the leading authority for the rule that the general personal estate is first liable to the payment of the debts of the testator, unless exempted by express words or by necessary implication.

When a man dies leaving different kinds of property, and likewise some debts, it is a matter of some importance to his heirs and devisees which of his property the debts are to be paid out of. For very good reasons the courts have established the following order in the liability to debts of the different properties belonging to the testator at the time of his decease.

1. The general personal estate. This was held in *Duke of Ancaster v. Mayer*. The general personal estate is also the primary fund for the payment of legacies.

2. Any estate devised for the particular purpose of paying debts.

3. Real estates which have descended to the heir, but not charged with debts.

4. Real estate devised to particular persons, but charged with the payment of debts.

5. General legacies.

6. Specific and demonstrative legacies and real estate devised

specifically or by way of residue, and not being at the time charged with debts.

7. Property over which the person whose estate is being administered has exercised a general power of appointment.

The reasons for this order of things have been well put by a learned writer. "The order in which the various portions of a testator's estate are applied for the payment of his debts has been established out of a regard to the testator's intention. The general personal estate was long the only fund to which those creditors who had not specialties binding the heir could resort, and besides, cash, stock and movables came first to hand, and are the most ready applicable, and are the funds out of which people in their lifetime usually pay their debts. Next after the general personal estates, any special fund set apart by the testator would naturally come. The heir, not being a beneficiary within the testator's intention, lands descended to him would properly follow next in the order of application. But lands charged with the payment of debts would, of course, be applicable before legacies bequeathed or property specifically given and not so charged. Again, there seems a more direct intention to benefit a specific devisee or legatee than to benefit a mere pecuniary legatee. Pecuniary legacies must, therefore, go unpaid rather than specific devises or bequests be touched. These, however, must be resorted to for the payment of debts as a last resource, whilst lands over which the testator has exercised a general power of appointment are, in favor of creditors, considered as supplementary applicable after the whole of the testator's own property has been exhausted." *Wms. Real. Assets*, 108.

In conclusion it should be observed that the general personal estate of the testator is *not* the primary fund for the payment of debts, in four cases, viz.:

1. Where it is exempted by express words.
2. Where it is exempted by the testator's manifest intention: and on this point the fact that the testator has charged his real estate is not alone sufficient, but he must also have shown that it was his purpose that the personal estate should not be applied.
3. Where the debt forming the charge or incumbrance is in its own nature real, *e.g.*, a jointure.

4. Where the debt was not contracted by the person whose estate is being administered, but by some one else from whom he or his vendor took it, as in the case of a mortgage created by an ancestor.

MARSHALLING ASSETS.

ALDRICH v. COOPER.

[8 Ves. 308; 2 Wh. & Tud. Ld. Cas. Eq. 228.]

At common law specialty creditors (*i.e.*, creditors whose rights were evidenced by contracts under seal) could collect their debts from either the real or personal estate of the debtor, while simple contract creditors (*i.e.*, those who had no sealed document to show for their claims) were confined to the debtor's personal estate. This distinction is now abolished by statute; but in the days when the old rule was in force, John Cooper died, leaving real and personal estate; and he also left some specialty creditors and a simple contract debtor named Aldrich. The specialty creditors got their hands on the personal estate of the late Cooper and paid themselves out of it, and the result was that Aldrich found nothing that he could realize on, for the land was not subject to his simple contract debt.

However, he found help in the Court of Chancery, which held that he was entitled to stand in the place of the specialty creditors, *so far as the personal estate had been taken away from him by the specialty creditors*. "A person," said the Chancellor, "having two funds to satisfy his demands shall not, by his election, disappoint a party who has only one fund."

The order in which assets are applied in the payment of debts, as stated in the previous case (*Duke of Ancaster v. Mayor, ante, p. 59*) only regulates their administration as between the testator's own

representatives and devisees, and does not affect the right of the creditors themselves to resort in the first instance, to all or any of the funds to which their claims extend. But the Court of Chancery in dealing with such creditors, has established the principle that a party having two funds to satisfy his demand, shall not, by electing to take a particular fund, disappoint another creditor who has only one fund to resort to. Under the common law it sometime happened that A., having a debt which he had a right to collect out of B., real or personal estate as he chose, elected to take it out of B.'s personal estate, and thereby left nothing for C., whose claim was only good as against personal estate. In such a case equity put C. in the shoes of A., as to his claim. This was called the marshalling of assets.

Of late years, particularly in the United States since the law has put all kind of debts on practically the same footing, the necessity for marshalling assets does not often arise. It is, however, sometimes applied for the benefit of junior encumbrancers of property, and for the protection of sureties.

*EQUITABLE MORTGAGES.***RUSSELL v. RUSSELL.**

[1 Bro. C. C. 269; 1 Wh. & Tud. Ld. Cas. Eq. 674.]

Just a century ago, a citizen of London wanted to borrow some money, and succeeded in getting a loan from one Russell, in whose hands, as a security, he placed a lease. The citizen afterwards became bankrupt, and Mr. Russell set up a right to have the leasehold estate sold to satisfy his debt, claiming that the deposit of the document with him constituted an equitable mortgage of the leasehold. The assignees in bankruptcy set up, on their part, the fourth section of the Statute of Frauds, which provides that no action should be brought on any contract for the sale of lands, etc., or any interest in or concerning them, unless the agreement was in writing, and where, said they, is there any writing here, — nothing was done but a simple deposit of the lease in Mr. Russell's hands.

But the court held that the deposit of the lease constituted an equitable mortgage, and that the interest should be sold to satisfy Mr. Russell's claim.

The general topic of mortgages does not at this day belong peculiarly to a work on equity, as the courts of law now recognize all those rights of the mortgagor, which in former times could only be protected by the Court of Chancery. For a concise history of the rise of the equitable doctrine relative to mortgages, and its triumph in the courts of law, the student is referred to Snell, Eq., cap. 16, or Bisph. Eq., cap. 7.

Russell v. Russell illustrates the doctrine of equitable mortgages. The principle upon which they are recognized appears to be that they were allowed necessarily from the nature of the case, for a court of law could not assist a person who had pledged his deeds to recover them back, as the answer to such an action would have been that they were pledged, and that the party who pledged them had no right to them until he paid the money; and again, if the person came into equity to recover the deeds, he would have been told, under the maxim, "He who seeks equity must do equity," that he must repay the money before he could have the deeds.

The doctrine of equitable mortgages has been disapproved of in Kentucky, Ohio, and Pennsylvania.

*TENANCY IN COMMON — “EQUALITY IS
EQUITY.”*

LAKE v. GIBSON — LAKE v. CRADDOCK.

[1 Eq. Cas. Ab. 294, pl. 3; 1 Wh. & Tud. Ld. Cas. Eq. 177; 3 P. Wms. 158; 1 Wh. & Tud. Ld. Cas. Eq. 179.]

Five persons purchased a place called West Thorock Level, from the Commissioners of Sewers and the conveyance was made to them as joint-tenants in fee, but they contributed rateably to the purchase, which was for the purpose of draining the Level. Several of them died. The court decided that they were tenants in common in equity, for the purchase was for the purpose of a joint undertaking, and though one of these five persons deserted the partnership for thirty years, he was let in again on terms. “This,” said the Chancellor, “was plainly a tenancy in common in equity, though otherwise at law.

It is a rule of law that where two or more purchasers take a conveyance to themselves and their heirs, they are joint tenants, and upon the death of one of them the estate will go to the survivor. The maxim being *jus accrescendi præfertur ultimæ voluntati*, except, indeed, in the case of merchants, where there has always been an exception to the rule of survivorship, for *jus accrescendi inter mercatores pro beneficio commercii locum non habet* — for the benefit of commerce the right of survivorship has no place among merchants.

In accordance with the maxim, “equity follows the law,” it was early held in the Court of Chancery, that notwithstanding the leaning of the court to a tenancy in common, in preference to a joint tenancy, an interest simply given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as “equally among,” or words to the like effect, or unless an inference of that sort arises in equity from the nature of the transaction, as in partnership, etc. *Morley v. Bird*, 3 Ves. 631. But there is

another maxim of equity, viz.: "Equality is equity." Acting on this courts of equity lean strongly against joint tenancy with its one-sided right of survivorship; for though each joint tenant has an equal chance of being the survivor and getting the whole, yet this is only an equality in point of chance, for as soon as one dies there is an end to the equality between them. And, therefore, the equal certainty of having an absolute equal share, or a share proportioned to the amount of the purchase money advanced, is considered the far higher and truer equity than an equal chance of having the whole or none of the property. Snell, Eq. 133.. And, therefore, courts of equity will lay hold of any circumstances from which it can reasonably be implied that a tenancy in common was intended. In the following cases the parties will be held tenants in common:—

1. Where the purchase money is paid in *unequal* proportions.
2. Where money is advanced in *equal* or *unequal* proportions by persons who take a mortgage to themselves jointly.
3. In partnerships and commercial transactions, — following, of course, the rule of law in this instance. But, notwithstanding the leaning of equity to a tenancy in common as giving really the true equality, yet if property, instead of having been *purchased* for a partnership, has been devised to the partners as joint tenants, and used by them for partnership purposes, they will still be joint tenants, and not tenants in common, unless by express agreement, or by their course of dealing with it for a long period, an intention to sever the joint tenancy may be inferred.

In those cases in which equity considers a tenancy in common to be created, the survivor is treated as a trustee for the representatives of the deceased person, an implied trust being created, founded upon an unexpressed but presumable intention. Indermaur Ld. Cas. Eq. 41.

PENALTIES AND FORFEITURES.

SLOMAN v. WALTER.

[1 Bro. C. C. 418; 2 Wh. & Tud. Ld. Cas. Eq. 1094.]

Sloman and Walter were partners in the Chapter Coffee House, and it had been agreed between them that Walter should have the use of a particular room when he wanted it. To secure this agreement Sloman gave Walter his bond for £500. Not long afterwards Walter notified his partner that he desired the room, but he would not let him have it. Walter, therefore, brought an action at law on the bond for the penalty. Sloman now applied to the Court of Chancery to have Walter enjoined from collecting the amount of the bond over and above the actual damage sustained.

The Court of Chancery decided that Sloman was entitled to an injunction, because the rule is that where a penalty is inserted merely to secure the enjoyment of a *collateral object*, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as additional, and to secure the damages really incurred.

PEACHEY v. DUKE OF SOMERSET.

[1 Str. 447; 2 Wh. & Tud. Ld. Cas. Eq. 1082]

A tenant of the Duke of Somerset made leases of the property he held, felled timber, and dug stones from it, and did other acts which, at law, constituted a forfeiture of his holding. Finding himself in this pickle, the tenant asked the Court of Chancery to relieve him from the forfeiture, if he should make compensation to the landlord for what he had done.

But the court answered that it could not help him. As there was no actual damage done, the court could not decree any compensation, and the power to give compensation was the only ground on which it could exercise jurisdiction.

Acting on the equitable maxim: "Equity looks to the intent rather than to the form," courts of equity frequently relieve against penalties and forfeitures which at law the parties have incurred by their acts or contracts. The relief of this kind, as to penalties, is given as a rule in two cases, (1) where compensation can be made. Here if the penalty is to secure the mere payment of money, courts of equity will relieve the party on his paying the principal and interest; (2) where the penalty is to secure the performance of some collateral act. Here the court will ascertain the amount of damages and grant relief on payment thereof.

Care must be taken to distinguish between a penalty and a sum which is really liquidated damages; not that it follows that because parties stipulate that a sum shall be paid on breach of a contract, "as and for liquidated damages," the court will always so consider the sum, for notwithstanding it is so called, it may be a penalty in the disguise of liquidated damages. (See *Kemble v. Farren*, 6 Bing. 141; *Lawson's Leading Cases Simplified*, Vol. I., p. 126.) But where the sum stipulated to be paid is really and in fact liqui-

dated damages, then the court will not interfere. The question of liquidated damages or a penalty is, however, one very often most difficult to determine, and depends upon the construction of the whole instrument taken together.

In regard to forfeitures the same general principles apply.

CONTRIBUTION—“EQUALITY IS EQUITY.”

DERING v. EARL OF WINCHELSEA.

[1 Cox, 318; 1 Wh. & Tud. Ld. Cas. Eq. 100.]

Thomas Dering, Esq., having been appointed a collector of customs, gave three different bonds to the Crown for the due performance of the duties of his office. In bond No. 1, his brother Edward was surety; in bond No. 2, the Earl of Winchelsea was surety, and in bond No. 3, Sir John Raus figured in the same capacity. Collector Dering did not make so good an officer as his friends and the government expected; he was addicted to gaming, and when his books were examined one day, he was found to be a debtor to the government to the extent of £3,883. This sum the Crown recovered by bringing suit on bond No. 1, whereupon Edward filed a bill against the Earl of Winchelsea and Sir John Raus, in which he asked that they should contribute their proportions of the sum he had paid the Crown on the judgment on his bond. Winchelsea and Raus tried hard to escape contributing their shares, but the court held that, though they were bound by different instruments, they must contribute, as the doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burden and benefit.

At common law no contribution could be enforced, though in recent times the common law courts have, in an indirect way, administered relief. But the remedy given by courts of equity is in every

way superior, for there is this important distinction between contribution in equity and at common law: in equity the contribution is with reference to the time when it is sought to be enforced, but at common law with reference to the number of sureties originally liable. Thus, A., B., and C. being sureties, A. is forced to pay the whole amount. B. has become insolvent; nevertheless at common law A. can only recover a third from C., though in equity he can recover half. Further, if a surety die, contribution can be enforced in equity as against his representatives; but at common law the surviving sureties only can be sued.

MARRIED WOMEN — EQUITY TO A SETTLEMENT — “HE WHO SEEKS EQUITY MUST DO EQUITY.”

LADY ELIBANK v. MONTOLIEU.

[5 Ves. 737; 1 Wh. & Tud. Ld. Cas. Eq. 424.]

I am the Lady Elibank,
Of all wives, I have thank
That seek their goods in the chancery.
Wives' equity to settlement
Hath worship and establishment,
And strength of days by this decree.
Seven years I strove there with my lord,
And plucked the flower of three-fold word,
In triple doom and mastery.

So speaks the heroine of this celebrated case in the lays of the Apprentice of Lincoln's Inn.¹ But about the case itself there was very little poetry, for it arose and was decided in a place where poetry is rather out of place — the Court of Chancery. A rich sister of Lady Elibank's had died intestate, and without children, and she was therefore entitled to a nice little share of money. When she applied to the administrator for some of it, the latter blandly produced two bonds, executed by Lord E., and which were an acknowledgment of a debt due from Lord E. to the

¹ Leading Cases done into English. By an Apprentice of Lincoln's Inn, London, 1876.

administrator. "As whatever share you may claim from your sister's estate belongs legally to your husband, I propose to retain it to pay his debt to me," said the administrator. Lady Elibank, thereupon, did a very unprecedented thing, — she filed a bill in equity against the administrator and her husband. The Chancellor decided in her favor, and laid it down that a married woman may maintain a suit in chancery to assert her *equity to a settlement* on herself and her children, out of property to which she is entitled, and as it appeared to him that the settlement which had been made on her on marriage was inadequate, he decreed a further settlement in her favor.

MURRAY v. LORD ELIBANK.

[10 Ves. 84; 1 Wh. & Tud. Ld. Cas. Eq. 432; 13 Ves. 1; 1 Wh. & Tud. Ld. Cas. Eq. 439.]

Lady Elibank unfortunately did not reap the fruits of her pluck. After the decree in the last suit, but before any settlement in pursuance thereof had been made, she died intestate, and another bill was filed by her infant children for the carrying out of the settlement in their favor, notwithstanding her death. They were successful. The court decided that the wife obtained by the decree in the suit of Lady Elibank v. Montolieu, a judgment for the children, liable to be waived if she thought proper; otherwise to be left standing for their benefit at her death.

At common law a married woman had very few rights of prop-

erty. An unmarried woman who owned property might deal with it as if she were a man, but on her marriage her husband got it all — her real property for his life, her personal property absolutely, and her rights of action (called *choses* in action) if he took them into his possession during the coverture. But, while with one hand the law took away her property rights, it gave her, in their place, several considerable immunities. She could not be sued on any contract she might make. She could not be sued even if her husband neglected to provide her with necessaries; for in this case she could so far bind him, that those who furnished her with articles of subsistence might sue him. *Manby v. Scott* and cases *seq.*, 1 Lawson's Ld. Cas. Simp. 45. The theory of the common law was, that the husband took the wife's property in consideration of the obligation which he contracted on marriage, of maintaining her and her children. But it very often happened that the husband did not do his duty in this respect, — for he might alien or squander the property which his wife brought him, and the law had no means of preventing him from doing this, or of enforcing his marriage obligation.

The Court of Chancery saw this, and straightway invented a method of remedying this injustice. Now and then a husband was forced to resort to a court of equity in order to get possession of property to which his wife was entitled; and in such cases the Chancellor, acting upon the maxim, "He who seeks equity must do equity," refused to help him unless he agreed to settle a portion of it on his wife for her separate use. This was called the *wife's equity to a settlement*, and though at first only enforced, when the husband was compelled to resort to the assistance of chancery to reach his wife's property, the courts of equity afterwards went further, and in *Elibank v. Montolieu*, decided that this settlement could be claimed by the wife coming into court herself as a plaintiff.

It should be remembered that the equity to a settlement is strictly personal to the wife, and the children have no independent equity of their own; so that in the case of *Murray v. Lord Elibank*, if Lady Elibank had died *before decree*, her children would not have been entitled to any settlement. If the settlement on a woman's marriage is perfectly adequate, no further settlement will be decreed; but when a settlement is decreed, the amount to be settled is *usually, and in the absence of special circumstances*, one-half of the property. If, after marriage, a settlement of property is made

upon the wife voluntarily, in consideration of her equity to a settlement, it is good as against creditors if the court would, under the circumstances, have decreed one, had application been made to it for the purpose. *Indermaur* Ld. Cas. Eq. 68.

*MARRIED WOMEN — RIGHTS AND LIABILITIES
AS TO SEPARATE ESTATE.*

JAQUES v. METHODIST EPISCOPAL CHURCH.

[17 Johns. 548.]

Mrs. Jaques being the owner of considerable real and personal estate, and wishing to keep it out of her intended husband's clutches, before her marriage conveyed it to trustees, to hold it in trust for her separate use after her marriage, during her natural life, and then to the use of those to whom she should devise it by her last will and testament. Before her death Mrs. Jaques conveyed the separate estate by deed, and the question was whether she could do this.

The case first came before Chancellor KENT, of pious memory, and he decided that as the deed of settlement of the separate estate pointed out the particular mode in which she might dispose of it, this method must be considered as the limit of her power, and as it provided that she should convey it by will she could not convey it by deed.¹ But in the Court of Errors, the Chancellor's decision was reversed, and the correct principle was declared to be that "unless *specially restrained* by the instrument creating the separate estate, a married woman is, with respect to that estate, a *feme sole* in equity," and may dispose of the estate in any

¹ Methodist Episcopal Church v. Jaques, 3 Johns. Ch. 77.

way she pleases, and a specification in the deed of settlement of particular modes in which she may dispose of the estate, will not, of itself, restrain her from disposing of it in any other manner.

At common law, as we have said, a married woman could not make a contract binding herself or her property. Equity, however, created a separate estate for her and gave her the power to dispose of it.

The jurisdiction of equity over the property of married women was exercised to a greater extent under its power as to *trusts*. Where property had been settled to the separate use of a married woman, equity looked upon the husband as a trustee of the property for the wife, and treated it as her own. In later times, and especially in the United States, the separate property of a married woman has, by statute, been freed from the grasp of the husband's authority, and from the liability for his debts and engagements. The rule of equity, has in short, been adopted by the Legislature, and at the same time, the power of a married woman over her property and her obligations regarding it, as laid down by the courts of chancery, have been judicially declared. These are (1) her power of disposing of her estate; (2) its liability for her contracts.

1. As to her separate estate, a married woman has in equity the same power of disposition as if she were unmarried, except in one case, viz.: where the power to dispose is restrained by the deed creating it. See *Tullett v. Armstrong*, *post*, p. 80. This is the general rule in this country, although in South Carolina and a few other States, it is held that she has not the power to convey her separate estate, unless such power is expressly given her by the instrument creating it.

2. A married woman's separate estate is liable for her debts and engagements. When a man makes a debt his property is liable to its payment. A court of equity having created a separate estate, has enabled a married woman to contract debts in respect to it, and therefore her property should be and is liable. It is not, however, liable to the same extent, as the property of a man or a *feme sole*. The true rule seems to be that it is liable for all debts which she expressly charges, or which, judging from their nature, it may fairly be presumed that she intended to charge on her separate estate.

South Carolina and the other States which we have mentioned as holding a contrary doctrine as to the power of a married woman to convey her separate estate, have also refused to adopt the above rule as to her power to bind it for her engagements.

*MARRIED WOMEN—SEPARATE ESTATE AND
RESTRAINT UPON ALIENATION.*

TULLETT v. ARMSTRONG.

[1 Beav. 1; 4 Myle & Cr. 377.]

Nathaniel Bradford, by his will, gave certain property to trustees in trust for his wife for life, with remainder to his granddaughter, Mary Tilt, for life, “in such manner that it should not be anticipated, and that no husband should acquire any control over it.” When the testator died Mary was unmarried, but in the lifetime of his widow she married Mr. Armstrong. The questions which arose and were settled in this case were (1) the effect of a gift to the separate use of a woman unmarried at the time; (2) the effect of the gift prescribing that the property should not be anticipated.

This case decided that both the separate use clause and the restriction against alienation became effectual on the subsequent marriage, and that such a restraint against alienation is annexed to the separate estate only, and the separate estate has its existence only during coverture; but that whilst the woman is discovert the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

The courts of equity having, as we have seen, allowed the wife to deal with her separate estate as she pleased, and likewise made it liable to her engagements, it was necessary to hit upon some plan to protect the separate estate of the wife both against herself

and her creditors, for this was generally the object of the donor in making such a disposition of his property to a married woman. The plan adopted was the insertion in the trust instrument, of a clause imposing a restraint upon alienation; declaring that the property should not be used "by way of anticipation." This was invented by Lord THURLOW, and sustained by the courts. Such a restraint was, of course, a violation of the rules of property, for what a man owns absolutely he has always a right to alienate if he wishes; and this right cannot be taken away by any condition or stipulation in the grant. But the courts of equity did not stick at this. "The separate estate and the prohibition of anticipation," said the Lord Chancellor in *Tullett v. Armstrong*, "are equally creatures of equity and equally inconsistent with the ordinary rules of property."

The restraint upon alienation, as appears from the above case, will not prevent the woman from disposing of the property settled to her separate use, if she chooses to do so before marriage, or in the interval between different covertures; but the restraint will attach whenever coverture takes place. Bisp. Eq., sect. 107.

The rule in *Tullett v. Armstrong* is the law of this country, except in Pennsylvania, Arkansas, and North Carolina.

ACCIDENT.

LOSS OF DOCUMENTS.

LAWRENCE v. LAWRENCE.

[42 N. H. 109.]

Joseph Lawrence, of New Hampshire, was hardly the kind of a son to hold up as a model to the rising generation. He induced his father to convey his farm to him, in consideration of his agreeing to maintain his parents during their lives, and to secure this promise, he gave a mortgage of the farm back to his father. Before the mortgage was recorded it was lost, and when the old man asked Joseph for a new one, he not only refused to execute a new one, but pretended that he never had given his parent a mortgage at all, but that Lawrence, Sr., had been dreaming all the time. Then he went on to treat the farm as his own; cut down the timber and commenced to make the most of it. The

old man went to the Court of Chancery and asked the judges to compel Joseph to make him a new mortgage. Here Joseph reiterated his story, that there never had been any mortgage at all, but the court, after hearing the evidence, decided that he was a liar as well as an ingrate, and ordered him to execute a new mortgage of the farm to his father.

The jurisdiction of the court in this class of cases comes under the relief against *accident*, which courts of equity will give.

By accident in equity is not meant some inevitable casualty or act of God or *vis major*, but "any unforeseen event, misfortune, loss, act, or omission which is not the result of negligence or misconduct in the party." Snell Eq. 420.

As the jurisdiction of equity in case of accident is only concurrent with that of courts of law, the former will only give relief (1) when a court of law cannot grant suitable relief; (2) when the party asking it has a conscientious title. Both these things must concur. And it should be noted that where the jurisdiction of equity has once attached by reason of there being originally no remedy in the matter at law, this jurisdiction will not be ousted, because the courts of law have voluntarily determined to give such relief, or have been authorized to do so by statute.

The cases in which equity will give relief against accident are:—

1. *Cases of lost and destroyed documents.*
2. *Cases of the imperfect execution of powers.*
3. *Cases of accidental forfeitures.*
4. *Cases of accidental losses.*

1. *Cases of lost and destroyed documents.*—Lawrence v. Lawrence, *ante*, p. 82, illustrates the first class. The interposition of equity in the case of lost documents arose in this wise. Formerly there could be no remedy on a lost bond at law, because it was required that it should be produced in court in order that the defendant might demand *oyer* of it, *i.e.*, that it should be produced and read in open court. Equity then stepped in and

remedied this defect. Although subsequently courts of law dispensed with this formality, the jurisdiction of equity which attached under the old practice was still retained. The same rule obtained at law as to lost negotiable instruments. This, too, has been altered in recent times.

2. *Cases of imperfect execution of powers.* — Tollet v. Tollet, *post*, p. 86, illustrates the second class.

3. *Cases of accidental forfeitures.* — Bostwick v. Stiles, *post*, p. 89, illustrates this class.

4. *Cases of accidental losses.* — Jones v. Lewis, *post*, p. 92, illustrates this class.

On the other hand, in the following cases of accident, equity will *not* relieve.

1. *In matters of positive contract created by the act of the parties.* — A man leases a house and covenants to pay rent for five years. Before the end of the first year the house is accidentally burned down. (See Lawson's *Ld. Cas. Simp.*, Vol. I., p. 165.) Equity will not relieve him from the payment of the rent for the rest of the term, for he might have provided against the liability by contract if he had been so minded.

2. *When both parties are equally innocent.* — A. is negotiating for the purchase of a house from C. They make a contract for the sale of the house, at a price to be fixed by B. during their life. Before B. makes his award, A. or C. dies. Equity will not enforce the sale on the ground of accident, for the time of making the award was expressly fixed in the contract according to the pleasure of the parties, and a different period cannot be substituted. Snell, *Eq.* 430.

3. *Where the party asking relief has been guilty of gross negligence.*

4. *Where the party asking relief has not a clear vested right.* — A millionaire, for example, may intend to leave A., B., and C. legacies of \$10,000 each by his will. Through some accident he dies before making a will, and A., B., and C., not being heirs, get nothing. Here, because they have no vested right, equity cannot help them. Another instance of this rule occurs in powers of appointment. If the donee fails, through accident, to execute a power, equity cannot help him, unless it is coupled with a trust, in which

latter case there is some vested interest to raise the equity. *Post*, p. 88.

5. *Where the other party has an equal equity*, as in the case of a *bona fide* purchaser for valuable consideration without notice.

*IMPERFECT EXECUTION OF POWERS.***TOLLET v. TOLLET.**

[2 P. Wms. 489; 1 Wh. & Tud. Ld. Cas. Eq. 227.]

One of Mr. Tollet's ancestors had settled some lands on him, with a power to make part of it over to his wife by *deed*, under his hand and seal. Mr. Tollet made it by *will*, and the court, notwithstanding this defect, sustained it. "The difference," said the Master of the Rolls, "is betwixt a *non-execution* and a *defective execution* of a power. The latter will always be aided in equity, under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party, whether to execute it or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do for himself."

Tollet v. Tollet is an authority for two principles: (1) that equity will aid the *defective* execution of a power; but (2) will not aid the *non-execution* of a power.

1. *Equity will aid the defective execution of a power.* — The jurisdiction of the court in cases of this kind, is based on the theory that the donee of the power has intended to execute it, but has been prevented from doing so by some accident or mistake, and equity will not, in such a case, suffer the intention to be defeated.

But the aid of equity is limited to five classes of persons, viz.: (1) A purchaser (which term included a mortgagee and a lessee), (2) a creditor, (3) a wife, (4) a legitimate child, (5) a charity.

Again, equity, will not give its aid where the will of the donor will be thereby defeated. We have seen that in *Tollet v. Tollet*, Mr. T. executed the power by deed, when he should have done so by will. Wise Mr. Tollet. If he had done the converse of this, his act would have received no help. A power to appoint by will cannot be exercised by deed, for the donor of the power is supposed to intend that the power shall be revocable during the life of the donee, and this intention is defeated by the execution of a deed.

2. *Equity will not aid the non-execution of a power.*—Because where there has been no exercise of the power at all, no intention to exercise it can be presumed, and there is therefore no ground for the interference of the court. To this rule, however, there are two exceptions:—

1. Where the execution has been prevented by fraud.
2. Where the power is coupled with a trust. *Withers v. Yeaton*, the next case, illustrates this exception.

*POWERS COUPLED WITH TRUSTS.***WITHERS v. YEADON.**

[1 Rich. Eq. 324.]

John Wagner devised his real estate and other property to his son George, to apply the rents and profits thereof to the use of himself and his family, and what he should not use up in this way he was to give or devise by deed or will to his (George's) children, in such proportions as he should think fit. George died without having executed this power, but on a bill filed in chancery, the court decided that his children were entitled to divide the property equally. "In all cases," said the court, "where property is given to one, enabling him to execute a power in a discretionary manner, and he does not exercise his discretion or execute the power, the class of persons among whom the bounty was to be distributed shall not be disappointed by his neglect, but shall take equally. The rule of all such powers is that they are trusts to be executed."

*ACCIDENTAL FORFEITURES.***BOSTWICK v. STILES.**

[35 Conn. 195.]

Mr. Bostwick was unfortunate enough to have his property foreclosed under a mortgage. But he had one chance to redeem it. By the decree of foreclosure it was provided, that if he should pay the amount of his debt (\$3,723.50) by the fifth day of August, 1867, he might have his property back ; otherwise not. Mr. Bostwick did not intend to let this chance go by. He wrote to his uncle, a man of means, on the matter, who promised him to let him have the money on the third of August. The third of August came, but not the money. He made other exertions with other people, but the time was too short, and two days later the fatal time expired, and Mr. Bostwick's land became the property of Mr. Stiles, the mortgagee. Mr. Bostwick thought this too bad, and so did the court to which he applied, for it ordered the foreclosure to be reopened, and Mr. B. to have another chance to redeem. And all this it did on the ground of accident.

"It is the peculiar province of a court of equity," said PARK, J., "to grant relief in cases of fraud, accident, or mistake, where there has been no fault on the part of the party seeking relief. * * * The question is, whether the facts of this case are sufficient to show that the failure to pay the respondent (Stiles) on the fifth day of August was occasioned by accident

without any fault or negligence on the part of the petitioner. If the petitioner had collected the amount and had it in his house to pay the respondent on that day, but on the night previous his dwelling had taken fire, and the money had been consumed, no one would doubt that the non-payment was the result of accident. If the petitioner had made arrangements with a bank, and they had agreed to furnish the money on certain security, and the security had been given, but owing to some sudden and unexpected revulsion in financial affairs, they had refused to fulfil their agreement at the last hour, could there be any doubt that the failure to pay according to the decree was owing to accident? Wherein does this differ in principle? The uncle of the petitioner was both able and willing to furnish the money. He had agreed to do so, and looking at probabilities in relation to future events, it was as morally certain that the money would be furnished, in the case of the uncle as in the case of the bank. There is a decree of uncertainty in regard to all expectations, and no more ought to be required in relation to future obligations imposed by law, than that such measures shall be taken to fulfil them as will render it reasonably certain, so far as human sagacity can foresee, that they will be performed. If such measures are taken and they result in a failure to pay as the decree requires, how can it be said that a party has been guilty of negligence? Even in actions at law, no greater degree of care is required to avoid injuries to others while in the performance of lawful acts, and if dangers result they are regarded as occasioned by inevitable accidents. Applying this rule and considering the case at the time the promise was

made, was there any reasonable doubt that would suggest itself to a man of prudence and sagacity that the money might not be furnished? The relation of the parties was that of uncle and nephew. The uncle had agreed to furnish the money. The case removes all doubt of his ability to do so. He knew the importance of fulfilling his promise. He knew his nephew was depending upon him, and that it would be worse than cruelty to disappoint him at the last. Every person in like circumstances would be led to suppose that the promise of the uncle was equivalent to having the money in hand. We think, therefore, that the petitioner was prevented from paying the respondent the amount of his claim on the third day of August, as he had intended, by the happening of some unforeseen event over which the petitioner had no control, and that he was consequently free from fault. ”

ACCIDENTAL PENALTIES.

JONES v. LEWIS.

[2 Ves. Sr. 240.]

Mrs. Lewis was the administratrix of her husband's estate. Called upon by the Court of Chancery to deliver certain goods to the legatee, she answered that this was impossible, as they had been stolen from her solicitor to whom she had entrusted them for safe keeping. The legatee did not think this a good excuse, but the court did; and Lord Chancellor HARDWICKE refused to charge her with the things lost.

In administering estates, executors and administrators sometimes pay some debts and legacies, thinking that the assets are sufficient for the purpose of paying all the debts and legacies. They are sometimes mistaken on this point, for unsuspected debts will often subsequently come to light. Under such circumstances, they used to be unable to get any relief in a court of law. But in equity, when they act in good faith and with caution, they are relieved; otherwise, they would be subject to an unjust loss from an accident.

So, if some of the property were stolen or destroyed by fire or other accident, while in the hands of an executor or administra-

tor, this circumstance was no defence at law when he was sued by a creditor or legatee. *Jones v. Lewis* shows that it is different in equity.

MISTAKE.

MISTAKES OF LAW.

HUNT v. ROUSMANIERE.

[8 Wheat. 174; 1 Pet. 1.]

A creditor took from his debtor a power of attorney to execute a bill of sale of a ship. The creditor took this kind of a document because he thought that it would be as valid a security as a mortgage, and it was not strange that he thought so, for he had consulted his lawyer who had advised him to this effect. But the lawyer was wrong. The debtor died, and his death having the effect of revoking the power of attorney, the creditor found himself without the security he had counted on.

The creditor went to the Court of Chancery for relief from his mistake, but found none. "Where the parties," said the court, "upon deliberation and advice reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension and

the insufficiency of such security, in consequence of a subsequent event not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed on."

LANSDOWNE v. LANSDOWNE.

[2 Jac. & W. 205; Mos. 364.]

This case is a lesson to people who, to save expense, try to find out their rights without consulting a lawyer. There once lived in England, four brothers, land owners. The second dies and the eldest and youngest both claim his land. They agree to leave their dispute to a schoolmaster in the neighborhood, who after consulting an "Every Man his Own Lawyer," delivers himself of a learned opinion to the effect that as it is a maxim that land cannot ascend, but always descends, the younger brother is entitled to the property. Acting on the schoolmaster's advice, the eldest brother, the real heir, executes a release of his claims to the youngest brother, but after a while, finding out what a fool he has been he applies to the Court of Chancery for relief.

The Lord Chancellor orders the release to be set aside, and the younger brother to convey the property to the eldest brother.

STAPLETON v. STAPLETON.

[1 Atk. 2; 2 Wh. & Tud. Ld. Cas. Eq. 836.]

This case is the leading authority for these doctrines of equity.

(1.) That an agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards appears that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement.

(2.) That where agreements are entered into to save the honor of a family, and are reasonable ones, a Court of Equity will, if possible, decree a performance of them.

GORDON v. GORDON.

[3 Swanst. 400.]

Because the younger brother disputed his elder brother's legitimacy, the latter was induced to enter into a compromise with the former for the settlement of the family estates. At the time of the compromise, however, the younger brother was aware of a private marriage that had taken place between his father and mother and this was not communicated to the other. The legitimacy of the elder brother by reason of their private marriage was afterwards established, and

although nineteen years had elapsed, the Court of Chancery decided that the compromise must be rescinded because of the concealment by the younger brother of the fact of the private marriage, and that it mattered not whether the omission to disclose it originated in design or in an honest opinion of the invalidity of the ceremony and a want of obligation on his part to make the communication.

A mistake is defined as "some unintentional act, omission or error, arising from ignorance, surprise, imposition, or misplaced confidence." When the mistake arises from imposition or misplaced confidence, equity relieves on the ground of fraud; but equity also relieves when there is no fraud — on the simple ground of mistake. Mistakes are of two kinds, (1) as to matters of law, (2) as to matters of fact.

As a general rule ignorance of the law excuses no one — *ignorantia legis neminem excusat* — and this maxim is as much observed in equity as in law. Therefore, ordinarily, as in *Hunt v. Rousmaniere*, *supra*, an agreement entered into in good faith, though under a mistake of law, will be held valid and obligatory upon the parties, in equity as well as in law. But there are some exceptions to this rule; and equity *will* relieve against a mistake of law —

1. *Where a party acts under ignorance of a plain and well-known principle of law*, as where the mistake is one of title arising from ignorance of a principle of law of such constant occurrence as to be supposed to be understood by the community at large. The case of *Landsdowne v. Landsdowne* given above is, on this exception, the reason of which is, that a mistake in such a matter affords a conclusive presumption of ignorance, imposition or the like.

2. *Where surprise is combined with a mistake of law.* *Tyson v. Tyson*, 31 Md. 134.

But where the mistake arises on a doubtful point of law, a compromise fairly entered into is encouraged in equity and will be upheld. And family compromises especially, as was held in *Stapleton v. Stapleton*, are favored by courts of chancery. "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have

been entered into to preserve the harmony and affection, or to save the honor of the family, those arrangements have been sustained by the court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers." *Westby v. Westby*, 2 Dr. & War. 503. But, as was held in *Gordon v. Gordon*, there must be a full and fair communication of all material circumstances which are within the knowledge of the parties, whether such information be asked or not; otherwise the compromise will not be upheld.

II. As to mistakes of fact see next cases.

MISTAKES OF FACT.

BROWN v. LAMPHEAR.

[35 Vt. 252.]

Martin Brown, of Vermont, conveyed to Calvin Lamphear, a lot of land on which was a spring from which Brown, by means of an aqueduct, supplied his own house with water. This aqueduct was of greater value to Brown than the price he received for the land. By the mistake of Brown, who never intended to part with the use of the water from the spring, the deed to Lamphear contained no reservation of such right; but Lamphear, when he purchased, had no knowledge of the existence of the spring. Finding out what he had done, Brown filed a bill in chancery, and that court held that he was entitled either to a conveyance from Lamphear of the right to use the spring or to a reconveyance of the land on repaying to Lamphear the purchase price, and that Lamphear might elect which he would do. "Where a mistake in a conveyance," said the court, "is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and

no intervening rights have accrued, and the parties may still be placed *in statu quo*, a court of equity will interfere, in its discretion, to prevent intolerable injustice."

We have seen that equity will not, as a rule, remedy mistakes of law; but as to mistakes of fact it is just the opposite. Here the general rule is that an act done or contract made under a mistake, or in ignorance of a material fact, is voidable and relievable in equity. But this relief is given only where the mistake of fact constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error, where it is inconsistent with good faith and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. Therefore, where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. Snell, Eq. 439. The jurisdiction of equity under the head of mistake is exercised principally in reforming written documents so as to conform to the intention of the parties, which, through mistake or ignorance, has not been expressed, viz.:—

1. *Equity will rectify mistakes in deeds and written contracts.*
2. *Equity will relieve where instruments have been delivered up or cancelled under a mistake.*
3. *Equity will remedy the defective execution of powers through mistake.* Here the same general principles are applicable as in cases of defective execution arising from accident. See *ante*, p. 86.
4. *Equity will correct mistakes in wills.* In regard to these there is no doubt that courts of equity have jurisdiction to correct them when they are apparent on the face of the will, or may be made out by a due construction of its terms, for in all cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity." Snell, Eq. 443.

In conclusion, there are cases in which equity will *not* relieve against a mistake of fact. They are: —

1. Where the equities are equal, *e.g.*, equity will not give relief against a *bona fide* purchaser for value.
2. Where the parties are volunteers.
3. Where the defect is declared fatal by statute.

FRAUD.

CONTRACTS IN RESTRAINT OF MARRIAGE.

MADDOX v. MADDOX.

[11 Gratt. 804.]

John Maddox, a member of the Society of Friends, by his will gave a legacy to his niece, Ann Maria, "during her single life, and forever if her conduct should be orderly, and she remain a member of the Society of Friends." Now, it was a rule of the society that a member who married an outside person thereby forfeited his membership. This was rather hard on Ann Maria, for when she arrived at a marriageable age there were but half a dozen unmarried Quakers in that part of Virginia. And, to make things worse, there was one Thomas Tiller, who was not a Friend, but who was very sweet on Ann Maria. The student will not be surprised to hear that she very soon became Mrs. Tiller, and that, when the other relations heard of it, they brought a suit to obtain her legacy, on the ground that it was forfeited by the terms of the will.

But the court held that Mrs. T., *née* Ann Maria, should keep the legacy. The condition was void, they said, for two reasons. In the first place, it infringed the perfect, absolute and unqualified freedom of relig-

ious opinion which the civil institutions of Virginia secured to all who dwelt under them.

And in the second place, the condition was void, because the marriage of the legatee to any one who was not a Quaker would lead to her expulsion from the Society of Friends and a consequent forfeiture of the legacy. "Conditions in restraint of marriage annexed to gifts and legacies," said LEE, J., "are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice. But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence, such a condition will be held utterly void."

*BARGAINS WITH HEIRS.***CHESTERFIELD v. JANSSEN.**

[2 Ves. 125; 1 Wh. & Tud. Ld. Cas. Eq. 592.]

Sir Abraham Janssen was a money-lender, and Mr. Spencer was a rake, pressed for money, but with great expectations from his grandmother, the Duchess of Marlborough. The old lady was seventy-eight years old, while the grandson was only thirty. This being the state of affairs Mr. Spencer borrowed £5,000 of Janssen, promising to pay £10,000 if he survived the Duchess, and nothing if she survived him. He survived her, and after her death gave the money-lender a bond for £10,000, and paid a part of it. Mr. Spencer afterwards died and his executrix filed a bill in chancery to be relieved from paying the bond because it was usurious and unconscionable.

But the court, without deciding whether relief would have been given against the original transaction, held that no relief could now be given, Mr. Spencer having, by his acts after his grandmother's death, ratified the transaction.

In the great case of *Chesterfield v. Janssen*, Lord Chancellor HARDWICKE divided fraud into four classes: —

1. Fraud arising from the facts and circumstances of imposition.
2. Fraud arising from the intrinsic matter of the bargain itself.
3. Fraud arising from the circumstances and condition of the parties.
4. Fraud affecting third persons not parties to the agreement.

1. The first of these divisions embraces what is known as actual fraud, the others what is called constructive fraud. Actual fraud is defined as "something said, done or omitted with the design of perpetrating what the party must have known to be a positive fraud." Snell, Eq. 449. Actual fraud arises (*a*) where there has been a misrepresentation, or, as the lawyers say, *suggestio falsi*, and (*b*) where there has been a concealment or *suppressio veri*. A misrepresentation amounts to fraud as to which equity will relieve when it is of some material fact as to which there is a confidence reposed in the party making it, and the other party is misled to his prejudice. And a concealment is a ground for equitable relief only where the party was under a legal obligation to disclose.

The last three of Lord HARDWICKE'S divisions of fraud are known as constructive frauds. "By constructive frauds are meant such acts or contracts as, although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as being acts and contracts done *malo animo*." Snell, Eq. 464. *Chesterfield v. Janssen* illustrates one of the cases of fraud of this kind. For, although in that case no relief was given because of confirmation by Mr. Spencer of the transaction, yet the particular subject of bargains with expectant heirs was there much considered. As to these, the rule in equity is to set them aside, unless the purchaser can show that he paid full consideration, or that the bargain, being made known to those to whose estate the expectant was hoping to succeed, was approved of by them. In a more recent case (*Nevill v. Snelling*, 15 Ch. Div. 679), the plaintiff was the youngest son of a marquis, who was a large landed proprietor, but he (the plaintiff) had no property or expectations except such as might be founded on the position of his father. The defendant had lent him money without any thought of repayment by the borrower from his own personal resources, but on the credit of his general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. Relief was given by the court, Mr. Justice Denman holding that the principle on which equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applied equally to the case of such a transaction as this, though the plaintiff was not an expectant in the strict sense of the term.

Other cases of constructive frauds of this class are: —

(a.) Marriage brokerage contracts. See as to these the rule of law as laid down in *Lawson Ld. Cas. Simplified*, Vol. I. p. 103.

(b.) Secret agreements in fraud of marriage.

(c.) Rewards for influencing another person in making a will.

(d.) Contracts in restraint of marriage. *Maddox v. Maddox* is on this point. It must be noted that if the condition is only in partial restraint of marriage, and is reasonable, it will be upheld. A condition against the second marriage of a widow is held to be reasonable.

(e.) Contracts in restraint of trade. See *Mitchel v. Reynolds*, 1 *Lawson Ld. Cas. Simplified*, 101.

(f.) Contracts for the sale of office and the like. See *Gulick v. Ward*, 1 *Lawson Ld. Cas. Simplified*, 87.

As to frauds under the third and fourth classes see the next cases.

*BARGAINS BETWEEN PERSONS IN FIDUCIARY
RELATION.*

HUGUENIN v. BASELEY.

[14 Ves. 273; 2 Wh. & Tud. Ld. Cas. Eq. 547.]

The Rev. Mr. Baseley so effectually gained the confidence of Mrs. Huguenin, who was then a rich widow, that she took her affairs out of her solicitor's hands and placed them in the clergyman's. The latter, with her sanction and at her request, undertook the management of her property; and she afterwards executed a voluntary settlement of some valuable property in favor of him and his family. Mrs. Huguenin having subsequently married, a suit was brought by her and her husband for the purpose of setting aside the settlement.

The court ordered that the settlement should be set aside, as obtained by undue influence and abused confidence in the defendant as an agent undertaking the management of her affairs.

The above case forms an instance of a constructive fraud, and proceeds upon the ground of the confidential relation existing between the parties; for it is a rule, that when any such confidence exists, and the party in whom it is reposed makes use of it to obtain an advantage to himself at the expense of the party confiding, he will never be allowed to retain any such advantage, however unimpeachable such transaction would have been if no such confidence had existed. This is upon the general principles of public policy. And gifts from child to parent; from ward to guardian; from client to attorney; from *cestui que* trust to trustee, all come within this rule.

As to frauds upon third parties, they may be divided into three classes, viz.: —

1. Frauds upon creditors. See *Sexton v. Wheaton*, *post*, p. 109.
2. Frauds upon marital rights. See *Countess of Strathmore v. Bowes*, *post*, p. 111.
3. Frauds upon powers. See *Aleyn v. Belchier*, *post*, p. 113.

*FRAUDS UPON CREDITORS.***SEXTON v. WHEATON.**

[8 Wheat. 229; 1 Am. Ld. Cas. 1.]

Joseph Wheaton, who had for several years held a government office, owned a house and lot in the city of Washington, where he lived. In March, 1807, he conveyed it to his wife, and in 1809 went into a mercantile business. But in this line he was not successful; for within two years he failed, and a lot of creditors were hunting for assets to liquidate their demands. Not finding enough of Joseph's property to satisfy them, the creditors filed a bill in equity to have the conveyance to the wife set aside, and the property applied to the payment of the husband's debts, basing their claim on a well known statute (13 Eliz., ch. 5), which declares that all conveyances (except *bona fide* transfers for a good consideration), made with intent to hinder, delay, and defraud creditors, shall be void as against the parties intended to be injured.

But the court decided that they only avoided conveyances as to those who were creditors at the time of their execution, and that a voluntary conveyance is good against those who become creditors afterwards, unless it is made with the fraudulent intent to defeat their claims. Here there was no such intent, for Mr. Wheaton could hardly be supposed to have these sub-

sequent creditors in his mind when he made the conveyance to his wife.

Of course, if a man is about to embark in a hazardous business, and puts his property in his wife's hands to be safe in the event of his being unsuccessful, this will be a sufficient indication of fraud, and the conveyance may be set aside.

*FRAUDS UPON MARITAL RIGHTS.***COUNTESS OF STRATHMORE v. BOWES.**

[1 Ves. 22; 1 Wh. & Tud. Ld. Cas. Eq. 406.]

I am the Countess of Strathmore,
I married Bowes and rued it sore
Yet spoiled his uttermost intent.

By cozenage and false championry,
Him seemed he had my wealth in fee,
And it was all in settlement.

Great words he spake in this despite
Of fraud and his marital right,
In vanity his words were spent.

Lady Strathmore was engaged to Mr. Grey, and a short time before the event was to come off she, with his approbation, conveyed her property to trustees, for her separate use. But Lady Strathmore was inconstant, for hearing that a Mr. Bowes had fought a duel on her account, she straightway consented to marry him. Bowes found out that he was not entitled to any of her property, and asked to have the conveyance she had made to the trustees set aside. The court held that a conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud, and that if a woman in the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, it will be set aside because affected with that fraud.

But this case, the court said, was different, the settlement, indeed, being with the sanction of the then intended husband, and so the settlement here was established.

A secret conveyance by a woman pending a marriage engagement is a fraud on the husband's marital rights, although he did not know she had any property.

There appears to be one exception to the general rule laid down in *Countess of Strathmore v. Bowes*, and that is in the case of the previous seduction by a man of his intended wife, for it has been held that, as the husband has, by his conduct before the marriage, put it out of the wife's power to make any stipulation for settlement of her property, retirement being impossible on her part, a secret settlement made by her shall not be set aside. *Taylor v. Pugh*, 1 Hare, 608

It was also formerly supposed that another exception existed in the case of a fair settlement by a widow upon her children by a former marriage, but the authorities do not appear to warrant this, and it cannot therefore be considered as an exception, for "it is conceived that a provision for children would not render a settlement valid which without it would be fraudulent; for although, in the execution of a settlement, so far as it makes provision for her children, a wife may perform a moral duty towards her children, she has no right to act fraudulently towards her husband; and she can in such circumstances only reconcile all her moral duties, by making a proper settlement on her children with the knowledge of her intended husband." 1 Wh. & Tud. Ld. Cas. Eq. 458; *Indermaur Ld. Cas. Eq. 59*.

*FRAUDS ON POWERS.***ALEYN v. BELCHIER.**

[1 Eden, 132; 1 Wh. & Tud. Ld. Cas. Eq. 377.]

From his uncle, Edward Aleyn received a devise of property *with power to make a jointure on any woman he should marry*. Edward married and executed the power in favor of his wife, but with an agreement that she should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts. The court held that this was a fraud upon the power, and its execution was set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.

“No point is better established,” said the court, “than that a person having a power must execute it, *bona fide* for the end designed; otherwise it is corrupt and void. The power here was intended for a jointure, not to pay the husband's debts. * * * If a father has a power to appoint amongst children, and agrees with one of them for a sum of money to appoint to him, such appointment would be void.”

A power, as here used, is an authority enabling a person through the medium of the Statute of Uses to dispose of an interest vested in himself or some third person. Thus land may be conveyed to A. in trust for such uses as B. should appoint; or in trust for such person or persons generally as B. should appoint, or in trust for such members of a particular class — as children, grandchildren,

etc.—as B. should appoint. B.'s right in such case is called a power. Bisp. Eq. 256. Powers have been divided into three kinds, viz.: appendant, in gross, and collateral. A power appendant is where the person to whom the power is given has an interest in the estate to which it is annexed; a power in gross is where a person having an interest in the land has power to create an estate therein, but only to take effect after the determination of his own interest. Both powers appendant and in gross may be defeasanced or released. Powers collateral are those given to persons taking no interest in the land, and are in the nature of trusts, so that they cannot be extinguished or destroyed, and equity will give assistance in case of the non-execution of such powers. See Tud. Ld. Cas., Con.

Powers may also be divided into general and special powers, the former being where there is a general power to appoint in favor of any person, and the latter where the appointment is limited to a particular class; and with regard to this division there is this important difference as regards the rule against perpetuities; general powers having no tendency or perpetuity, the time of vesting is reckoned, not from the creation, but from the execution of the power, but special powers having such a tendency, the time of vesting runs from the instrument creating the power. Indermaur's Ld. Cas. Eq. 15.

It is well settled that a power must be executed *bona fide* for the end designed, otherwise it is void. *Aleyn v. Belchier* illustrates this; the power to raise a marriage portion for the wife being exercised for the purpose of paying the appointer, it was a fraud upon the power and equity set the transaction aside.

BONA FIDE PURCHASERS.

BASSET v. NOSWORTHY.

[Cas. Temp. Finch, 102; 2 Wh. & Tud. Ld. Cas. Eq. 1.]

A bill was filed by an heir-at-law against a person claiming as purchaser from a devisee under the will of his ancestor to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration *bona fide*, without notice of any revocation.

The court held that this plea was good, and upon proof of it the bill was dismissed.

This case was decided upon the well known rule that equity will never give its assistance against a *bona fide* purchaser who had no notice of any adverse title. It also forms an illustration of the equitable maxim, "where the equities are equal the law will prevail"; for in this case the heir at law had an equal equity with the purchaser from the devisee. But, as the latter had become possessed of the legal estate, his title was the best.

SPECIFIC PERFORMANCE.

NOT GENERALLY DECREED OF CHATTELS.

CUDDEE v. RUTTER.

[5 Vin. Ab. 538, pl. 21; 1 Wh. & Tud. Ld. Cas. Eq. 786.]

Cuddee bought from Rutter a large amount of South Sea stock to be delivered on the 20th of the next November. Before the time of delivery South Sea stock went up very high, and on the 20th of November, Rutter did not tender the stock, but offered to pay the difference. Cuddee would not hear of this, but, thereupon filed a bill in chancery asking the court to compel Rutter to transfer the stock as he had agreed. The court, however, decided against him, the Lord Chancellor saying that it was like the case of a bargain for corn to be delivered upon a day certain at such a price, and the corn is not delivered according to the contract, the buyer shall not, by a bill in equity, compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law for breach of the agreement to recover damages; *i.e.*, the differ-

ence between the price agreed on by the parties, and the price of corn upon the market day.

And so Cuddee had to be content with the difference.

ARTICLES OF SPECIAL VALUE.

PUSEY v. PUSEY.

[1 Vern. 173; 1 Wh. & Tud. Ld. Cas. Eq. 820.]

The title to the Manor of Pusey, in England, was held by a horn which had been given to the first owners by King Canute, and which bore this inscription:—

Kyng Knowd geve Wylyyam Pewse
This horn to hold by thy lond.

The plaintiff who was heir to the property filed a bill asking that the defendant be ordered to deliver it up; and the court so ordered.

DUKE OF SOMERSET v. COOKSON.

[3 P. Wms. 389; 1 Wh. & Tud. Ld. Cas. Eq. 821.]

The Duke of Somerset owned an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. It had been sold by one who had got possession of it, to Cookson, a goldsmith.

The Duke prayed the court to order Cookson to deliver it up, which was done.

At common law a party who agrees to do a certain thing cannot be compelled to do it; all the court can do is to award damages for the breach. Courts of equity, however, *where damages are not an adequate recompense* will require him to carry out his contract, or in other words, will decree specific performance of the agreement.

In the case of chattels, damages are usually a sufficient compensation for the breach of an agreement to deliver or for their detention from the real owner. Therefore, the jurisdiction of equity to decree specific performance is extended only to cases "where the party wants the thing in specie and he cannot otherwise be compensated; that is where an award of damages would not put him in a situation as beneficial as if the agreement were specifically enforced, or where the compensation in damages would fall short of the redress which his situation might require. The general rule is not to entertain jurisdiction to decree a specific performance respecting goods, chattels, stocks, choses in action, and other things of a mere personal nature; but the rule is qualified and is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy." *Phillips v. Berger*, 2 Barb. 609; 8 *Id.* 527. The cases where equity *will* decree specific performance are:—

1. *Where the chattel is of such a nature that its loss cannot be compensated for in damages.* *Pusey v. Pusey*, and *Duke of Somerset v. Cookson*, illustrate this rule. As said in one case: "The Pusey horn, the altar-piece of the Duke of Somerset, were things of that sort of value that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people who have not these feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." *Fells v. Reed*, 3 Vesey, 71. Other cases where damages would not compensate may be mentioned. Thus, though as settled in *Cuddee v. Rutter*, the specific execution of a contract to deliver stock will not be decreed, yet when the kind of stock is limited, it may be. "I agree," said the Vice-Chancellor, in *Duncuft v. Albrecht*, 12 Sim. 199, "that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But in my opinion there is not any sort of analogy between a quantity of three per cents or any other stock of that description, which is always to be had of any person who chooses to apply for it in the market, and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." Another great Chancellor has put the case of a ship carpenter purchasing timber which was peculiarly

convenient to him by reason of its vicinity, or an owner of land covered with timber contracting to sell it in order to clear his land, and assumes that in both these cases equity would decree a specific performance. *Buxton v. Lister*, 3 Atk. 385. Every case depends on the particular circumstances, the test being, are *damages* a complete remedy?

2. *Where a fiduciary relation exists between the parties.* Here equity to prevent an abuse of power, and by virtue of its jurisdiction over trustees, will nearly always interfere.

CONTRACTS RELATING TO REAL PROPERTY.

SETON v. SLADE.

[7 Ves. 265; 2 Wh. & Tud. Ld. Cas. Eq. 513.]

The plaintiff agreed to sell certain real estate to defendant, and it was agreed that he should make a good title in two months. Defendant afterwards gave him a notice that if he did not do so he should insist on the return of his deposit with interest. The plaintiff, however, only delivered his abstract of title a few days before the expiration of the two months, which the defendant then received and kept without objection. The court held that the vendee, under the circumstances, was not entitled to insist on time as of the essence of the contract, and so specific performance was decreed.

LESTER v. FOXCROFT.

[1 Colles P. C. 108; 1 Wh. & Tud. Ld. Cas. Eq. 768.]

By parol merely, Lester agreed that he would pull down certain houses on Foxcroft's land, and build other new ones in their place; and in consideration of this Foxcroft, also by parol, agreed that he would give Lester a long lease of the property. Lester went to work, pulled down the houses and built some of the

others, but when he applied for the lease Foxcroft refused to give it; and when Lester threatened to go to law about it, referred him to the Statute of Frauds, which requires leases of lands to be in writing to be binding.

But Lester, like a wise man, went to the Court of Chancery and asked the specific performance of the contract on Foxcroft's part. And what is more, he got it, notwithstanding the Statute of Frauds, on the ground of his own part performance of the parol agreement.

WOOLLAM v. HEARN.

[7 Ves. 221; 2 Wh. & Tud. Ld. Cas. Eq. 484.]

The plaintiff filed a bill for the specific performance of a written agreement. This agreement when produced provided for a rent of \$73.10 per annum; but the plaintiff said that this was a mistake, it should only have been \$60, "and I want," he said, "the court to order the defendant to execute me a lease according to the agreement with this variation; that the rent be \$60."

But the court refused, on the ground that, though a defendant resisting a specific performance may go into parol evidence to show that by fraud or mistake the written agreement does not express the real terms, the plaintiff cannot do so for the purpose of obtaining a specific performance with a variation.

We have seen that as to chattels, courts of equity do not usually decree specific performance — damages being, as a rule, a sufficient recompense. But in contracts respecting land it is not so. The

locality, soil, or character of the land gives it generally a peculiar value in the eye of an intending purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same local conveniences, and therefore a compensation in damages would not be adequate relief. It would not attain the object desired, and it would generally frustrate the plans of the purchaser, and therefore the jurisdiction of courts of equity to decree specific performance is, in cases of contracts respecting lands, universally maintained, whereas in cases of chattels it is limited to special circumstances. Snell, Eq. 529.

Seton v. Slade shows how far equity will go in enforcing agreements concerning land. At common law one party to a contract cannot complain of a breach by the other, unless he can show his own compliance with its terms in every particular. *Seton v. Slade* shows that, though the terms may not have been strictly complied with, yet specific performance may be decreed. But in such a case the court will take care to make proper compensation. And this principle of decreeing specific performance with compensation is applied where the vendor seeks specific performance and has not exactly the interest he contracted to sell, but the difference is not material; but a purchaser cannot be forced to accept lands of a different tenure to what he contracted to buy, for this is not considered a matter for compensation.

Lester v. Foxcroft shows that, in spite of the Statute of Frauds requiring agreements as to lands to be in writing, courts of equity consider that after a person has been allowed to do acts in part performance, it would be a fraud on the part of the person who has allowed him to do such acts not to perform his part of the contract. Acts to be a part performance must be exclusively referable to the agreement, and such acts as payment of purchase-money, delivery of abstract, and the like, are *not* sufficient part performance; but letting a purchaser into possession is.

There are also two other cases in which specific performance of a parol contract will be decreed; and they are (1) where it is fully set forth by the plaintiff in his bill, and admitted by the defendant in his answer, and he does not insist on the statute as a defence; and (2) where the agreement was intended to be reduced into writing according to the statute, but was prevented by the fraud of one of the parties.

With regard to the decision in *Woollam v. Hearn*, that a plaintiff cannot get specific performance of a contract with a parol variation, though good as a general rule, yet it must be noted that there are

three cases in which a plaintiff may so obtain specific performance with a subsequent parol variation, and they are of a similar nature to the three cases above stated in which specific performance will be decreed of an original parol contract, viz.: (1) after such acts of part performance of the parol variation; (2) where defendant sets up the parol variation, and plaintiff seeks specific performance with it; and (3) where it has not been put into writing because of fraud. *Indermaur* Ld. Cas. Eq. 87.

*WHEN SPECIFIC PERFORMANCE NOT
DECREED.*

DODSON v. SWAN.

[2 W. Va. 511.]

Mr. Dodson, finding that he was indicted by the grand jury of Marshall County, West Virginia, was in a hurry to leave the State, and was advised by his friend Swan to stand not on the order of his going, if he did not wish to be locked up. To enable him to escape money was necessary, and Swan, like a good friend, offered to buy his farm. Dodson agreed; a contract was drawn up, and Swan paid him a part of the purchase-money for travelling expenses. The storm blew over, Dodson came back, but when Swan tendered him the balance of the purchase-money, in accordance with the agreement, he refused to convey the property, and Swan filed a bill in chancery to compel him.

But he did not succeed. "It is well settled," said the court, "that where a contract grows out of an illegal or immoral act, a court of justice will not lend its aid to enforce it. It is both an illegal and an immoral act to aid or assist a felon to avoid or escape from prosecution or punishment."

The above case is given as an illustration of the cases in which—whether the contract be personal or real—a court of equity—without taking into consideration whether damages are a sufficient relief or not—will *not* decree specific performance. These are:—

1. *An agreement arising out of or providing for an illegal or immoral act.*

2. *An agreement without consideration.* Thus an agreement to make a gift cannot, as a rule, be specifically enforced.

3. *A contract which the court has no means to enforce.* Thus a singer agrees to sing at a certain theatre, but when the time comes refuses to carry out her contract. A court of equity will not decree its specific performance, because it cannot compel her to sing. But it may accomplish this result indirectly, by restraining her from singing any where else. See *Lumley v. Wagner*, 1 Lawson's Ld. Cas. Simp. 268.

Other contracts of this class are contracts to transfer the good will of a business, to build and repair premises, and revocable contracts.

4. *Contracts wanting in mutuality.* An infant cannot maintain a suit for specific performance, because a court of equity cannot compel a specific performance against him.

JURISDICTION OF EQUITY — “EQUITY ACTS IN PERSONAM.”

PENN v. LORD BALTIMORE.

[1 Ves. 444: 2 Wh. & Tud. Ld. Cas. Eq. 923.]

The names of the parties to this suit are familiar enough to the American student, for one gave his name to a great State, the other to a great city. They had each by grants from the King of England obtained large tracts of land in America, notably the then provinces of Pennsylvania and Baltimore. They had entered into articles settling the boundaries of these provinces, and the defendant, not being willing to execute his part, Mr. Penn (both he and Lord Baltimore being at the time in England) sought a specific performance of the articles by an English court of equity. Lord Baltimore objected that the property was out of the jurisdiction of the court.

But the court decided that Penn was entitled to specific performance of the articles, for though the court had no original jurisdiction on the direct question of the original right of the boundaries, the property being abroad, yet that did not at all matter, as the suit was founded on the articles, and the court acted *in personam*.

The above case forms a good illustration of the well-known maxim or principle, “Equity acts *in personam*,” a maxim which indeed shows the great difference in the jurisdiction of equity to

that of law; thus at law the only remedy on a breach of contract was an action for damages; but in equity, as the court acted *in personam*, the party could always be compelled to do the very act. So in this case, although the property was abroad, and, therefore, the court really in respect of the property had no jurisdiction, yet the parties being within its jurisdiction, the court was able to award the proper remedy, acting not at all on the property, but directly on the persons.

INJUNCTIONS.

ENJOINING PROCEEDINGS AT LAW.

MARINE INSURANCE CO. v. HODGSON.

[7 Cranch, 332.]

The schooner *Sophia* was insured for a voyage in the Marine Insurance Company for \$8,000; and being captured on the voyage, the owners brought an action at law on the policy and recovered judgment for the \$8,000. The insurance company now asked a Court of Equity to enjoin the collection of this judgment on the ground that the owners had been guilty of misrepresentation in obtaining the insurance. It was argued by their counsel that a court of equity had jurisdiction to enjoin proceedings in courts of law. The court decided that it had. "Without attempting," said Chief Justice MARSHALL, "to draw any precise line to which Courts of Equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was

prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery."

"On the other hand," said the judge, "it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully tried at law, although it may be the opinion of the court that the defence ought to have been sustained at law." As the company were not prevented from making the defence (the false representation) in the law suit, the injunction was refused.

Courts of law could redress injuries, after they were committed, but they had no power to prevent their commission. To supply this injustice came the jurisdiction of equity to issue an injunction. An injunction is defined to be a writ issued by a court of equity commanding a defendant to perform some act, or restraining him from the commission or continuance of some act. Bisp. Eq. 399. An injunction is either mandatory or prohibitory. The former compels the defendant to do something; the latter restrains him from doing something. But the former is not much used, for the order of a court of equity is not direct, but in a roundabout way commands while it apparently prohibits. Thus if A. held papers from B. and obtained the aid of the court, the writ instead of commanding A. to deliver to B. the papers, would order A. not to keep them from B.

Injunctions are generally issued for three purposes, viz. :

- I. To restrain proceedings at law.
- II. To enforce a contract or to forbid a breach thereof.
- III. To prevent a tort, *i.e.*, a wrong, independent of contract.

I. *To restrain proceedings at law.* The right of a Court of Chancery to restrain proceedings in the law courts was at first stoutly resisted by the common law judges as impairing their dignity. Earl of Oxford's Case, 1 Ch. Rep. 1; 2 Wh. & Tud. Ld. Cas. Eq. 601, 611. But equity does not attempt to dictate to the law court, but acting *in personam* enjoins the *parties* from proceeding. This jurisdiction of equity, as stated by Chief Justice MARSHALL in the above

case, is now well settled. The cases in which equity will *not* stay proceedings at law are —

1. Where the matter is criminal.
2. Where the ground of defense was equally available at law.
See *Marine Insurance Co. v. Hogdson*, *supra*.

*INJUNCTIONS TO RESTRAIN VIOLATION OF
CONTRACTS.*

STEWARD v. WINTERS.

[4 Sandf. Ch. 587.]

Mr. Steward was the owner of the store No. 18 William Street, New York City. He leased it to Winters for two years, the lease providing that the store was to be occupied for the regular dry goods jobbing business, *and* for no other kind of business. Winters went into possession and immediately began to make an auction mart of it. Over the door he suspended a red flag, and advertisements of the daily auction sales to take place at No. 18 appeared every morning in the newspapers. Now, Mr. Steward had not inserted that covenant in the lease for nothing; he had an objection to auction sales in his building, and he called upon Winters to stop them. But the latter would do nothing of the kind, and Mr. Steward was obliged to apply to the Court of Chancery in the matter.

The court ordered Winters to stop the auction sales. "Where the parties," said the Vice-Chancellor, "by an express stipulation have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continuing breach of the stipulation by the one, which this court can perceive may be highly detrimental to the other, although, on the facts presented, it is not clear that there is a serious injury, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court by injunction to restrain further infractions of the covenant, thereby preventing a multiplicity of petty suits at law, and, at the same time, protecting the rights of the complainant."

The jurisdiction of equity to enjoin the doing of a thing is founded upon very good reasons. In many cases damages are no redress to the sufferer at all. But, in addition to this, the injury is generally a continuing one, and the sufferer, though he might have obtained damages for the past injury, would not be able to assess his future discomfort, and thus would be put to the expense of bringing a suit once a month or once a year, as the case may be. Therefore equity intervenes, and to prevent irreparable mischief which could not be compensated by a money judgment, or to suppress interminable litigation, orders the party to cease his injurious acts.

The jurisdiction of equity to forbid a violation of the terms of a contract, is coextensive with its power to compel specific performance. Often, where the court cannot decree specific performance on account of its inability to carry the decree into effect, it will grant an injunction to restrain the doing of an act contrary to that agreed on, and thus indirectly compel a specific performance. This was the singer's case. She could not be compelled to sing at the plaintiff's theatre, but the court restrained her from singing at

any other, and thereby the same end was attained. *Lumley v. Wagner*, 1 Lawson's Ld. Cas. Simp. 268.

Sometimes the contract is not to do a thing. Here equity can act directly, as in the case of *Steward v. Winters*, above.

*RESTRAINING NUISANCES.***ST. HELEN'S SMELTING CO. v. TIPPING.**

[11 H. L. Cas. 642; L. R. 1 Ch. 66.]

Mr. Tipping, of Lancashire, manifested his objections to smoke in a very practical way. Having purchased a house and grounds situated within a short distance of the works of a copper smelting company, he found very soon that to live in that region was simply out of the question. From the tall chimneys of the works smoke and noxious vapors issued night and day; it injured his trees and shrubbery; made his cattle sick, and rendered his own existence intolerable. Mr. Tipping therefore resorted to an action for damages. The company proved that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close to their own, whose smoke was quite as injurious as theirs, and that the smoke of both sometimes united, making it impossible to say to which of the two any particular injury was attributable. They also relied on the fact that their works had existed before the defendant bought his property. Nevertheless, Mr. Tipping recovered £361 damages, and although the company carried the case all the way to the House of Lords, all the judges thought him entitled to the verdict.

“In matters of this description,” said Lord Chancellor WESTBURY, “it appears to me that it is a very desirable thing to mark the difference between an action

brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not

apply to the circumstances, the immediate result of which is sensible injury to the value of property.' And the judges held, also, that the fact that the locality where the offensive trade was carried on was one generally employed for the purpose of that and similar trades, would not exempt the company from liability to an action for damages in respect of injury created by it to property in the neighborhood.

Mr. Tipping now came into chancery and prayed that they might be enjoined from carrying on their offensive works. Here the defendants laid particular stress on the fact that the plaintiff had nothing to complain of because he had moved into the proximity of the offensive trade. But the court held that the injunction would not be refused on that ground, and the defendants were ordered to stop their mills.

Injunctions to restrain nuisances are a constant subject of equity's action, and will be issued where plaintiff's right is clear and the damage cannot be repaired by a money judgment. The nuisance, however, must be imminent; a mere threat will not be sufficient. The kinds of nuisances which will be thus enjoined are very many — thus noises, offensive smells, waste, pollution of air and water, will all be abated, in a proper case, by the writ of injunction issued out of the Court of Chancery.

*PUBLIC NUISANCE ENJOINED BY EQUITY.***HAMILTON v. WHITRIDGE.**

[11 Md. 128.]

Mlle. Margaret Hamilton purchased a house on Frederick Street, in the city of Baltimore, had it furnished, and was about to move in, when she found herself the defendant in a chancery suit. There is nothing wrong in buying a house, or in occupying it, but Miss Hamilton's new neighbors, having discovered that she was a woman of easy virtue who had kept a house of ill-fame in another part of the city, were shocked, and asked the Court of Chancery to restrain her from occupying the house on Frederick Street as a house of ill-fame, on the ground that the close proximity to them of such a place would deprive them of the comfortable enjoyment of their property, and greatly depreciate and lessen its value.

The injunction was granted, and Miss Hamilton had to locate her establishment in some part of the city where the residents were not so sensitive.

What the law calls nuisances are divided into two classes,—public and private. A public nuisance is suppressed by indictment or information; it is the public that is supposed to be aggrieved by what the defendant has done, and individuals, as individuals, have nothing to do with it. To this rule, the above case, and others like it, offer an exception, viz., that when the public nuisance is particularly obnoxious to an individual, it is considered, so far as he is concerned, to be also a private nuisance, and he may

apply for an injunction in respect of it. Or he may bring an action at law for damages if he likes that method of relief better.

As we have seen there are many cases where a man may bring an action and recover damages for an injury which the Court of Chancery will not enjoin. The assistance of a Court of Equity is only granted to prevent irreparable injury and a multiplication of actions.

*NUISANCE FROM NOXIOUS VAPORS.***CAMPBELL v. SEAMAN.**

[63 N. Y. 568.]

Mr. Campbell was the owner of a dwelling house and grounds in the vicinity of a brick kiln. In his grounds were ornamental shade trees, grape vines, and fruit trees. Seaman, who was the owner of the kiln, in manufacturing the brick, mixed anthracite coal dust with the clay and sand, which, when burned, produced a noxious gas which was carried by the wind whenever the burning was going on, over to Campbell's place. Because these gases injured his trees and vines, Campbell asked for an injunction which was granted, Seaman being restrained from using the anthracite coal in the way he had been doing.

The law of smoke and noxious vapors is that every person has a right to have the air diffused over his premises in its natural state, free from artificial impurities. Of course it is not every little impurity which another may send into the atmosphere which will be enjoined, otherwise no one could build a fire in his stove, not to speak of the number of necessary industries which must more or less contribute to the pollution, in some measure, of the air. But nobody has a right to contaminate the atmosphere to such an extent as to render the occupancy of his premises physically uncomfortable to a person of ordinary sensibilities, for any of the purposes to which the owner may choose to devote it.

The law as to smells is similar. Stenches of such a character as to be offensive to the senses, or to produce actual physical discomfort, or which interfere with the comfortable enjoyment of one's

property, are nuisances. The question is well put by a New Jersey Chancellor in an instructive case decided in 1868. "It is clear," says he, "that everything that renders the air a little less pure, or is to any extent disagreeable, is not necessarily a nuisance. The smoke that may, in certain conditions of the atmosphere, descend from a neighbor's chimney, the fumes that may sometimes be wafted from his kitchen, though not desirable or agreeable, are not a nuisance. Between them and the dense smoke from a kiln or factory that renders breathing difficult or painful, and smells offensive to the verge of nauseating, there is debatable ground on which it may be difficult to fix the exact point at which the smoke or smell becomes a nuisance in the eye of the law." *Ross v. Butler, post*, p. 162. Therefore, it is, that no general test can be laid down, but each case is to be considered and decided on the facts.

Location, of course, has much to do with the question whether a certain manufactory is or is not a nuisance. A nuisance, like a manufactory emitting great volumes of smoke, is as much a nuisance if located in a part of a town among the houses of the poor, as if in another part among the residences of the rich. "I find," said the Chancellor in *Ross v. Butler, post*, p. 162, "no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders or intolerable noises, even if the inhabitants are themselves artizans who work at trades occasioning some degree of noise, smoke and cinders. Some parts of a town may, by lapse of time or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise and dust, that an additional factory which adds a little to the common evil would not be considered at law a nuisance or be restrained in equity. There is no principle in law or the reasons on which its rules are founded which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artizan and laborer and their families the fewer and more restricted comforts which they enjoy."

Because a man does not live in the house which a nuisance is alleged to injure, is no reason why it should not be abated at his suit. All that is necessary is that he should own the house, and

that the nuisance diminishes its value by preventing people from occupying or buying it. *Peck v. Edler*, 3 Sandf. 127.

If A., B., C., D., and any number more, are affected by a nuisance in their neighborhood, they may all join in a suit to restrain its continuance. *Peck v. Elder*, 3 Sandf. 127.

*NUISANCE FROM NOISE — BELLS.***SOLTAU v. DE HELD.**

[2 Sim. (N. S.) 133.] •

The sound of church bells is often a very pleasant one to hear at a distance. But like some views, it is distance which generally lends enchantment to the sound; for it may be questioned whether the bell-ringers, themselves, experience any particular sensation of pleasure from the melodies they produce. Over thirty years ago, Mr. Soltan was a steady-going family man, residing in a semi-detached house at a place called Clapham. The adjoining house was, from 1817 to 1848, occupied as a private house, but in the latter year it was bought by a religious order of Roman Catholics, calling themselves “The Redemptionist Fathers,” and those gentlemen converted the house into a chapel, and appointed De Held, a Roman Catholic priest, to officiate therein. One of the first acts of Mr. De Held, on entering on the scene of his ministrations, was to set up a harsh and discordant bell, and to ring it with pious unscrupulousness at the most unearthly and unnecessary times. As Soltan, speaking for himself and the neighbors generally, said plainly: “The practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement or devotion; and is peculiarly injurious and distressing when

members of our household happen to be invalids ; it tends also to depreciate the value of our dwelling houses." This was a complaint emanating, not from the general body of Claphamites, who, being at a greater distance, were more or less indifferent to the matter, but from those who were the greatest sufferers, the immediate neighbors, and it was on this ground of special annoyance that Mr. Soltan was considered entitled to be heard. Mr. Soltan made out such a good case that the Court of Chancery enjoined the "Fathers" from ringing their bells so as to disturb and annoy him and his family.

About five years ago, a chime of church bells in Philadelphia — the bells of St. Marks' Church — were restrained on account of its disturbing the neighborhood. The parties differed materially about the facts. The plaintiff said: "That the noise of such ringing was harsh, loud, high, sharp, clanging, discordant, producing a nuisance which disturbed rest and sleep, distracted the mind from any serious employment, interfered with conversation in the immediate neighborhood, lessened or destroyed social and domestic intercourse, peace, and happiness; and in particular, was detrimental to the health and comfort of invalids, children, and persons whose nervous systems are delicately organized; that the effect was not limited to the periods of actual ringing, but the anticipation of its beginning produced a nervousness and excitement which to all is painful, and to some intolerable." While the defendant insisted "that the chiming complained of is neither a public nor private nuisance, being in truth and fact musical, mellow, soft, well pitched, sweet, and harmonious, and of such an agreeable character that it has grown to constitute one of the chief attractions of the neighborhood, and has materially added to, rather than detracted from, the enjoyment of social and domestic life among those residing in the vicinity." Also, "That bell-ringing is part of the ordinary and usual sounds of city life, the chiming complained of being far less calculated to disturb ordinary citizens than the customary bell-ringing in factories, schools, and some other churches, or the noises of cars, wagons, steam whistles, and other sounds incident to a city; and that even if they produced on some

persons, when first heard, a temporary annoyance, the hearers would soon get so accustomed to the sound that they would not notice it, except where an imaginary or trifling annoyance is fostered by wilful prejudice or heightened by nervous excitability." The court observed: "It is alleged, on the other hand, by the defendants, that bell-ringing and the chiming of bells date from a remote period in the Christian Church, that they have been received with general favor and acceptance, and that it would be difficult to find any great poet, from Dante down to our own times, whose verse does not bear witness to this truth: that the sounds so much complained of are not a mere accidental accompaniment, but have from associations become an integral part of the celebration of the Sunday, which brings an opportunity for rest to all; and that the court should be slow to believe that a custom, hallowed by the observance and sanctioned by the assent of successive generations of worshipers, can be injurious; and that in fact, in the present case, as will be apparent on examining the testimony, if some persons inveigh against the bells which give occasion for this suit, other and not less numerous voices are raised in their behalf. The court is consequently asked to infer, that if the sufferings for which the bill seeks relief are not imaginary, they are the inevitable offspring or accompaniment of nervous disease, although a morbid or excited fancy attributes them to the peals issuing from the tower of defendants' church." Eminent physicians, however, testified to the deleterious effects of the chiming. It appeared, too, that the bells were rung four times on Sunday, and twice on every week-day, and on festivals and Saints' days, from ten minutes to half an hour at a time, averaging from seventy-five to ninety-four strokes a minute. This was deemed too much of a good thing and was enjoined. *Harrison v. St. Marks' Church*, 12 Phila. 259. I take the report of this case from Mr. Irving Browne's very entertaining "Humorous Phases of the Law."

*NUISANCE FROM NOISE—IMPROPER USE.***BRODER v. SAILLARD.**

[2 Ch. Div. 692.]

Mr. Saillard, as the judge remarked, found himself in a very unfortunate position. He had rented a house with a stable adjoining at a high rent and on the usual terms. He had occupied the house as all people do who have houses, and he had put his horses in the stable as all people do who have stables, when suddenly, very much to his annoyance, he found himself the defendant in a chancery suit. The tenant of a house which was close to the stable had notified the landlord that the horses of Mr. Saillard made such a noise that he would have to leave; and the landlord, in order not to lose a good tenant, asked the Court of Chancery to make Mr. Saillard move his horses away.

“It is very hard,” said the judge, “on the defendant, who is a gentleman, with these horses in his stable, and whose horses do not appear to make more than the ordinary noise that horses do, if he is not to be allowed to keep his horses in his stable. On the other hand, it is very hard on the plaintiffs if they cannot sleep at night, and cannot enjoy their house because the noise from the stables is so great as seriously to interfere with their rest and comfort. The question is on which side the law inclines.”

The judge came to the conclusion that the law inclined in favor of the plaintiff, and Mr. Saillard's

horses had to go. "If a stable is built," said he, "not as stables usually are, at some distance from dwelling houses, but next to the wall of the plaintiff's dwelling house, in such a position that the noise would actually prevent the neighbors sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling house, all I can say is, that is not a proper place to keep horses, although the horses may be ordinarily quiet."

The test in all these cases, to determine whether the noise will be stopped by injunction, is not whether the party is using his property for lawful and proper purposes, but is whether the use of the property is reasonable, in view of the right of the neighbors to peace and quietness. Said JESSEL, M. R., in the above case: "I take it the law is this: that a man is entitled to the comfortable enjoyment of his dwelling house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling house, so as to cause serious annoyance and disturbance, the occupier of the dwelling house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling houses so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom, or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which no doubt may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore I think that (*i.e.*, that plaintiff is making a lawful use of his property) is not the test."

In a somewhat earlier case Chancellor SELBORNE laid down the same test thus: "In a case of nuisance of this character there are always two things to be considered, — the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for

which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house or any portion of it to unusual purposes, in such a manner as to produce substantial injury to his neighbor, it appears to me that this is not, according to principle, a reasonable use of his property, and his neighbor, showing substantial injury, is entitled to protection." *Ball v. Ray*, L. R. 8 Ch. App. 467.

*NUISANCE FROM NOISE — PROPER USE.***POOL v. COLEMAN.**

[8 Daly, 113.]

“Drat that baby,” said Mr. Pool. Now, Mr. Pool had very good reasons for not admiring that particular infant to which he referred. He lived on the fourth floor of a French flat, on Madison Avenue, New York City. The man up stairs was Mr. Coleman; and the man up stairs, unfortunately for Mr. Pool’s peace of mind, had a baby — a cross baby, at that. The baby was at that infantile period called teething, and refused to be quiet, either day or night, except while it was being drawn across the room in a baby carriage. The flats, being put up to rent, were like the houses in Pentonville, described by Thackeray, — “where you hear rather better outside the room than in;” so the rumbling of the carriage overhead was very clearly heard below, and what put the baby to sleep kept Mr. Pool awake. Mr. Pool protested, but it was of no use, so he asked the court to abolish the mid-night rides of the *enfant terrible*.

The terrible infant, however, triumphed, for the court would not even order him to be rocked in a cradle, instead of drawn round in a carriage. The judgment of the court contains such an interesting discussion of the questions which the case raised,

that a lengthy extract from it may not be out of place:—

“ Certain noises,” said the judge who delivered the opinion, “ like the noise of a pianoforte in a neighbor’s house, or a noise of a neighbor’s children in a nursery, we must always expect, and must to a considerable extent put up with. In the city of New York various causes have combined to bring about the crowding of numbers of people into one house. Poverty forces the poor into tenement houses, and fashion lures the well-to-do into French flats. But there can be but one law for the two classes of dwellings; or, perhaps, I might say for both varieties of that species of abode called apartment houses. The restriction of the use of a baby carriage in a French flat would logically be followed by the prevention of the use of sewing machines in tenement houses. Certainly, the noise of an ordinary sewing machine must be quite as offensive as that of a parlor carriage, and the day laborer needs rest and sleep quite as much as the dweller in a French flat; and yet no man would approve the enjoining the seamstress from stealing a few hours from night for the purposes of her trade. It is true that no laborer is likely to complain of any disturbance of his sleep, for ‘ weariness can snore upon the flint, when restive sloth finds the down pillow hard; ’ but that consideration does not change the principle. Where a man makes himself one of a hundred gathered under a roof, and selects for his home a house so flimsily built that the tread of a woman’s bare foot upon a heavily carpeted floor makes a vibration to be complained of by those living on the floor below, he cannot expect the immunity

from noise and disturbance which he would enjoy in a house occupied by his own family alone, nor can he restrain other occupants from any use of their own apartments consistent with good neighborhood, and with a reasonable regard for the comfort of others. If the rocking of a cradle, the wheeling of a carriage, the whirring of a sewing machine, or the discord of ill-played music, disturb the inmates of the apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable, and made without due regard to the rights and comforts of the occupants. The situation of the dwellers in apartments, whilst it has its advantages, must be in some respects less agreeable than that of those who occupy a whole house. They cannot expect the same quiet and repose. A man who lives in a hotel must not be surprised if aroused from sleep by the heavy foot of some guest passing by his door at an unseasonable hour. Nor ought the plaintiff to have been surprised by the use of any ordinary means which the defendant might employ to lull his sick child to sleep. No man has a right to such an immunity from noise that his neighbor cannot stir in his own room. There is nothing in the affidavits to lead me to the conclusion that the defendant in having this carriage instead of a cradle, made a use of his apartments, which in view of the plaintiff's right to quiet and repose, was unreasonable. It is probable that a cradle swinging upon pivots, set in ordinary standards, would have answered the purpose as well as the carriage, and as it would make no noise, good neighborhood might suggest the use of it; as a matter of law, however, if the defendant himself were taken sick, and obliged to walk the

floor all night through pain, the plaintiff would have no right to insist that he should put on India rubbers. As has been said, each case must stand by itself, and where people indulge their inclination to be gregarious, they must not expect the quiet that belongs to solitude."

NO TRADE A NUISANCE PER SE.

CATLIN v. VALENTINE.

[9 Paige Ch. 575.]

In the very heart of a populous portion of the great city of New York, the defendant was erecting a building to use as a slaughter-house, when the adjacent property owners went into court to prevent him. Here the defendant admitted that such was his purpose, but denied that it was a nuisance.

The court permitted him to go on with the building, but restrained him from using or permitting it to be used as a slaughter-house, until the final hearing of the case, when it would hear evidence as to whether the slaughtering of cattle at the place proposed was not offensive and injurious to the neighboring inhabitants.

The Chancellor said: "The situation of the defendant's building, in reference to the dwellings of the complainants, would, *prima facie*, render the occupation of such building, for the purpose of slaughtering cattle there a nuisance; and as there is no real necessity that such an offensive business should be carried on in this part of the city, where many valuable dwelling houses of the best kind are already erected and are continuing to be built, the Vice-Chancellor was right in retaining the injunction until

final hearing. The answer of the defendant that a slaughter-house would not be offensive to the plaintiff is matter of opinion only. ”

No trade can be a nuisance, *per se*, because it is obvious that there may be, from time to time, improvements discovered that may make something formerly offensive wholly inoffensive, and it is no reason, because a certain kind of manufacturing establishment, or a certain use of property, has been in a previous case decided to be a nuisance by a court hearing the evidence as to the manner it was conducted, and its results, that, therefore, every manufactory or use of property of the same kind, is to be taken to be a nuisance *per se*, and without hearing any evidence. Formerly, the rule was different, and the courts used to hold that those trades and uses of property which by experience had been demonstrated to be of a noxious or hurtful character were nuisances, *per se*. Acting on this principle they have enjoined such things as a blacksmith forge, a beer house, a glass house, a swine sty, a candle factory, a tannery, a privy, etc. But now, thanks to modern progress, the courts have changed all this, and as said by a Scotch judge: “Science has gone far to prevent many things from being a nuisance that were formerly of that description. It is not, therefore, very easy to determine beforehand, whether or not any given thing shall prove a nuisance.” *Arnot v. Brown*, 1 Macq. 229.

But because there are certain trades and uses of property which have been demonstrated to be productive of ill results as a general rule, the court on application to abate such an alleged nuisance, will treat it *prima facie* as such, and will enjoin it until all the evidence on the subject has been produced by the party who is complained against. On this ground the temporary injunction in *Catlin v. Valentine* was granted.

A good illustration of this rule arose in St. Louis, in 1879. One Russell, in an aristocratic part of the city of St. Louis, commenced erecting a building to be used as a livery stable, and the residents made a great effort to have him stopped. But Judge DILLON refused to stop him, telling the complainants that a livery stable in the residence portion of a city is not, as a matter of law, a nuisance to the improved property adjoining or near it, or to the neighbors. But at the same time he said to Russell: “You may proceed to finish your building, and use it for a livery stable. But if it shall, hereafter, be found by a jury or court that your stable does interfere with the comfortable enjoyment of the neighboring prop-

erty, you cannot complain if you are perpetually enjoined from the further use of it for the purpose for which it was designed." *Flint v. Russell*, 8 Cent. L. J. 68.

*NUISANCE MAY BE DISAGREEABLE WITHOUT
BEING HURTFUL.*

WALTER v. SELFE.

[4 DeG. & Sm. 318.]

Near the residence of Mr. Walter, there was a brick-yard, and in the process of burning bricks there came from the brick-yard vapors and floating substances which were very disagreeable to Mr. Walter, so disagreeable that he asked the Court of Chancery to restrain them. The evidence showed that these vapors were very obnoxious to the inmates of Mr. Walter's house, but it did not appear that they were hurtful in their effect, or that they produced any tangible injury to his property.

The question, therefore, arose whether a smell that is simply disagreeable to ordinary persons, but not hurtful, is such an annoyance to ordinary persons as to make it a nuisance. The court said it was. "The question," arises said the Vice-Chancellor, "whether this is a nuisance to the plaintiff or occupier of his house, a question which must, I think, be answered in the affirmative, though whether to the extent of being noxious to human health, to animal health in any sense, or to vegetable health, I do not say or deem it necessary to intimate an opinion. * * * I am of opinion that this point is against the defendant. As far as the human frame in an average state of health is con-

cerned mere unsalubrity, mere unwholesomeness, may possibly, as I have said, be out of the case, but the same may perhaps be said of stye'd hogs, melting tallow, and other such inventions less sweet than useful. That does not decide the dispute, a smell may be sickening though not in a medical sense. Ingredients may I believe be mixed with air of such a nature as to affect the palate disagreeably and offensively though not unwholesomely. A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps even suffer more annoyance from nauseous or fetid air from being in a hale condition." And the brick-maker had to close his yard.

A chancellor, as has been well said, does not wait till noisome trades and unwholesome gases kill somebody before he proceeds to restrain. *Dennis v. Eckhardt*, 3 Grant's Cas. 392. Noxious vapors need not be hurtful or unwholesome to be nuisances; it is sufficient if they are so offensive as to produce such annoyance, inconvenience or discomfort as to impair the comfortable enjoyment of property by persons of ordinary sensibilities.

And it is laid down that the fact that the person complaining is in a delicate state of health, and therefore more susceptible to injury from the nuisance, or that the property injured is of a peculiarly delicate character, is no defence. An English case which arose some years ago presented this point very well. Mr. Cook manufactured colored mats. These mats were made from cocoa-nut fibre, dipped in dyes, and then hung out in the air to dry. His neighbor, Forbes, carried on the manufacture of chemicals, and when the wind was in the east a kind of gas from Forbes's chimneys was blown into Cook's yard, which took the color out of his mats so that he was obliged to dye them over again. When Cook complained, Forbes replied that the gas from his works hurt nobody else, and that Cook ought to keep his mats inside. But the Chancellor did not so reason. "It appears to me quite plain," said he, "that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin or any sort of metallic dye, and that his neighbor is not at liberty to pour in gas which will interfere with his manufacture. If it can

be traced to the neighbor, then, I apprehend, he will be entitled to come here and ask relief." *Cook v. Forbes*, 5 Eq. Cas. 166.

The student should carefully note this distinction between injuries to property and personal inconvenience, — viz., that the court will interfere much more readily in the former class of cases than in the latter. If the nuisance injures property to any extent, that is generally enough, while it is not every little inconvenience to personal comfort which will obtain the aid of a Court of Equity for the purpose of restraining the obnoxious cause.

*COMING TO NUISANCE.***BRADY v. WEEKS.**

[3 Barb. 156.]

Mr. Brady and other owners and residents of dwellings on Twelfth Street, New York city, filed a bill in equity asking that Weeks should be restrained from using a building near them as a slaughter-house. In answer, Weeks said, first, that his slaughter-house did not cause any smell that any one could object to; and, secondly, that he had occupied the building in this way for about fourteen years, while the plaintiffs had only within the last three or four years erected their houses and come to live there.

But the court granted the injunction. "To constitute a nuisance," they said, "it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. The slaughter-house in question is to be regarded as *prima facie* a nuisance to the plaintiffs, notwithstanding the qualified denial of the defendant that it is not a nuisance." Nor did Mr. Weeks succeed in his second plea. "When the slaughter-house was erected," the court continued, "it was remote from the thickly settled part of the city; but it seems that the city has now grown up to it, and

that the necessities of the corporation require the occupation of the lots in the immediate vicinity for dwellings. When it was erected it incommoded no one, but now it interferes with the enjoyment of life and property, and tends to deprive the plaintiffs of the use and benefit of their dwellings. There can be no real necessity for conducting such an offensive business as slaughtering cattle in this part of the city, which is now occupied by valuable and costly dwellings. As the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens. This, public policy as well as the health and comfort of the population of the city demands; and it seems that whenever *any* offensive trade becomes an injurious nuisance to any person, such person has a remedy by an action on the case for damages, or by writ of nuisance to have the nuisance abated, upon the principle that every continuance thereof is a new or fresh nuisance."

SMITH v. PHILLIPS.

[8 Phila. 10.]

Smith was the tenant of a fruit farm, out of which he made his living, and he was, therefore, not at all pleased to see, one day, a building next to where his fruit trees were in blossom turned into a chemical factory. When his lease expired, instead of Smith going somewhere else to carry on his business, he got a renewal, and then set to work to have the court stop

the chemical factory, which it was clear was injuring his trees and fruit very much.

The chemical manufacturer contended that as Smith knew by experience the effect of the chemicals on the adjoining land, he had voluntarily placed himself in a position to be injured by renting the farm again, and that he ought, therefore, to have no relief.

But the court did not think much of this plea, for it held that the fact that Smith would not be driven away from the premises was no defence.

St. Helen's Mills Co. v. Tipping, and *Brady v. Weeks*, decreed, among other things, that the fact that a person comes to the nuisance voluntarily, instead of the nuisance coming to him, does not deprive him of his right to complain. *Smith v. Phillips* is an extension of this principle, viz.: that the fact that the complainant continues to rent the property at the same rent after the nuisance is established is no bar.

*NUISANCE — LENGTH OF TIME IMMATERIAL.***ROSS v. BUTLER.**

[19 N. J. (Eq.) 294.]

Some of the residents of a New Jersey town complained of the smoke which a pottery near them emitted. It appeared that the pottery did throw out a most extraordinary lot of smoke; and, that the smoke being of the blackest and thickest kind, was very offensive to the neighborhood; but as it also appeared that it only occurred twice each month, for twelve hours at a time, the defendant tried to defend himself on this ground.

But the court held that *time* was not an element to be considered. "I am not aware," said the Chancellor, "of any authority or established principle holding that a clear unmistakable nuisance, which it is intended to commit periodically will be permitted, because it does not exist the greater portion of the time, but only for a small portion of it. The court will not determine that a family shall have their dwelling house made uncomfortable to live in for twelve hours, once in two weeks, or that they shall protect themselves by closing the house tightly, and remaining in-doors for that time. It is surely no justification to a wrong-doer that he takes away only one twenty-eighth of his neighbor's property, comfort, or life. The qualifications contained in the opinions of

judges that a lawful business will not be restrained for every trifling inconvenience, and that persons must not stand on extreme rights, and bring actions in respect to every matter of annoyance, does not refer to the proportion of time for which the nuisance is continued, but only the degree or kind of annoyance."

If the act complained of is really a nuisance, the frequency of its repetitions, or the length of its maintenance, is not a matter to be considered. The same is true of a public nuisance. Thomas Gallagher, of Massachusetts, being prosecuted for maintaining a common nuisance, to wit, a tenement, for the illegal sale of intoxicating liquors, the proof was that the tenement was a tent in which Thomas had dispensed whiskey and water for the space of only two hours. Yet Thomas did not escape the penalty. It was the nature of the act done, and not the length of time during which it was committed, that constituted the offence, quoth the court. *Com. v. Gallagher*, 1 Allen, 592.

*INFRINGEMENT OF PATENTS.***CALDWELL v. VANVLISSENGEN.**

[9 Hare, 415.]

In the year 1838, there was granted to James Lowe, a patent for a steam screw for propelling vessels. Twelve years thereafter some ship-owners in Holland commenced to manufacture these screws, and to apply them to their steamships which ran between Holland and England. Finding this out, Lowe's assignees, the owners of the patent, applied to the Court of Chancery to enjoin the Dutchmen from using the patent in English waters. The defendants' lawyer had two objections to offer, viz.: —

1. In the first place he said that the court could not exercise its jurisdiction restraining the use by foreigners of the patent on board a ship built in a foreign country, and owned and manned by subjects of that country.

2. In the second place, he argued that the plaintiffs should first establish at law that their patent was a valid one.

But the Chancellor overruled both objections. "I take," said he, "the rule to be universal that foreigners are, in all cases, subject to the laws of the country in which they may happen to be," and as to the second point, he said: "The question whether the court will

interfere to protect a patentee before he has established his right at law, or will suspend its interference until the right at law has been established, appears to me to depend upon very simple principles. It is part of the duty of this court to protect property pending litigation, but when it is called on to exercise that duty, the court requires some proof of title in the party who calls for its interference. In the case of a new patent this proof is wanting; the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the court therefore refuses to interfere until his right has been established at law. But in a case where there has been long enjoyment under the patent (the enjoyment, of course, including use), the public have had the opportunity of contesting the patent, and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good, and the court therefore interferes before the right is established at law. In the present case, I think that the plaintiffs have proved such a case of enjoyment under the patent, and of their title having been maintained at law against the several attempts which have been made to impeach it, that the court is bound at once to interfere for their protection," and the injunction was issued.

Equity's relief by injunction is very efficacious against those who infringe patent rights, and is better than an action for damages at law, in three ways: First, the court will order an inspection of the defendant's machinery or premises, to see in what particulars the plaintiff's patent is being infringed; second, it will perpetually enjoin these infringements, and thirdly, it will make the defendant account for the profits he has made, and will make him show them.

Of course, the plaintiff must have a valid patent in order to give

him any title to come into equity for relief; but the above case establishes the rule that when the plaintiff's title is admitted or seems clear from all the circumstances to the court, equity will not compel him to establish it at law, and from the length of time of its existence a presumption of an exclusive right will arise.

LITERARY PIRACY.

PRINCE ALBERT v. STRANGE.

[1 MacN. & G. 25.]

When Queen Victoria was a good many years younger than she is now, she and her husband, to amuse themselves, made some etchings, and had copies made for themselves and their intimate friends, on a private press. Somebody surreptitiously obtained a copy of the set and sold them to a bookseller, who, knowing the public taste for anything smacking of royalty, advertised the forthcoming publication of the etchings and solicited orders. The pictures must have been very bad, for Prince Albert, when he heard that they were going to be given to the public, obtained from the Court of Chancery an injunction restraining their publication, as also that of the catalogue announcing them, by the defendant, although he was a *bona fide* purchaser. This was on the ground that the author or composer of a work of literature, art or science, as long as it is unpublished, has a right in it which no one can invade, without his consent.

FOLSOM v. MARSH.

[2 Story, 100.]

Jared Sparks wrote a "Life of Washington," in twelve volumes, and duly copyrighted it according to the laws

of the United States in this regard. Several years after, the Rev. Charles W. Upham was seized with a like desire to honor the father of his country in a like way, and soon from his pen there appeared a "Life of Washington" in two volumes. When Mr. Sparks' publishers came to look at the new work, they discovered that there was a good deal of similarity between the two. Of the 866 pages of Mr. Upham's work, 353 pages had been copied entire from Mr. Sparks' "Life." Their remonstrances being in vain, they sought the assistance of the Court of Chancery, where an injunction was obtained restraining Mr. Upham from selling his book, and ordering an account of his profits to be taken.

After a work is published there is no common-law copyright in the United States. An author who desires to publish his book and obtain a monopoly of its sale must comply with the copyright statutes, by entering it with the Librarian of Congress, and printing upon each copy the notice of copyright.

But *before publication* an author has a common-law copyright, and no one who has obtained his work without his consent can make any use of it. Printing a few copies of a book or sketch for the use of your friends, or delivering a lecture to students, or performing a play on the stage, is held not to be a publication of the thing so as to divest the author's property.

An author who has duly copyrighted his work holds title against the world, and equity will enjoin any person who publishes it without his consent. To this principle, however, there are two qualifications: —

1. *Equity will not assist the proprietor of an immoral, libelous, obscene or seditious book, pamphlet or work of art.* The United States Circuit Court a few years since refused to enjoin the unauthorized production of the "Black Crook," on the ground that "it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person." *Martinetti v. Maguire*, 1 Dedy, 216.

2. *Equity will not enjoin bona fide quotations or a bona fide abridgment of a copyrighted work.* It is clearly settled that it is not an in-

fringement of a copyright of a book, to make *bona fide* quotations or extracts from it, or a *bona fide* abridgement of it, or to make a *bona fide* use of the common materials in the composition of another work. But the question always arises, Has there been a legitimate use of the copyright publication by the fair exercise of a mental operation deserving the character of a new work? If one, instead of searching into the common sources and obtaining his materials from them, avails himself of the labor of his predecessor, and adopts his arrangement, or does so with only a colorable variation, this will be an infringement. In the leading case above, it was argued that the Rev. Mr. Upham had not gone beyond this; but the court thought otherwise. "What constitutes a fair and *bona fide* abridgment," said Judge STORV, "is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scizzors, or extracts of the essential parts constituting the chief value of the original work."

Equity has sometimes enjoined the publication of private letters. The rules on this subject are:—

1. The writer of a letter has such a right in it as to entitle him to restrain its publication by the party written to or his assigns.

2. The party written to has a right to restrain its publication by a stranger.

*TRADE-MARKS. — FAMILY NAME USED TO DE-
CEIVE.*

CROFT v. DAY.

[7 Beav. 232; 2 Tud. Ld. Cas. 563.]

Day & Martin's blacking is, or was at the time of this case, about as well known in England as the *Times* newspaper or the Tower of London. The firm was established in 1801, and had been in existence nearly fifty years, when a nephew of the senior partner commenced making blacking himself, and finding a person of the name of Martin, obtained the use of his name, and began to offer to the public Day & Martin's blacking, put up in bottles and bearing labels having a general resemblance to those of the original firm. The latter did not like this at all, and requested the Court of Chancery to restrain the nephew. An injunction was issued to this effect. "The principle in these cases is," said the court, "that no man has a right to sell his own goods as the goods of another. No man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own."

*TRADE-MARKS—NO RELIEF TO WRONGDOER.***SEABURY v. GROSVENOR.**

[14 Blatchf. 262.]

A certain firm in New York prepared plasters, which they called “Benson’s Capcine Plasters.” After the manner of patent medicine men generally, they advertised their great remedies for pains and rheumatics all over the country. The readers of their advertisements were informed that a celebrated chemist had recently discovered a vegetable of extraordinary value, with which he had effected the most marvellous cures; that this great remedy was called Capcine, and was used in the celebrated Capcine plasters. The easily gulled public of course swallowed the story and bought the plasters. Attracted by the profit to be made from the name, another party commenced to sell an article he called Capcine plasters; and to enjoin him from so doing the firm brought a suit in equity.

Unfortunately for them, however, the evidence in court proved that there was no such vegetable or article as Capcine known to chemistry or medicine, and on this ground the injunction was refused. “The authorities are clear,” said the court, “that in a case of this description, a plaintiff loses his right to claim the assistance of a Court of Equity.”

A man manufacturing or selling any kind of goods has a right to distinguish them by a symbol, which symbol is called a trade-mark, and is used to show that he is the manufacturer or seller as the case may be. For another person to use his symbol is, therefore, (1) an invasion of his property right, and (2) a fraud on the public,

who are enticed into purchasing goods of B. thinking they are the goods of A. To prevent this sort of thing, equity will enjoin the infringement of a trade-mark; except as was held in the *Capcine* case above, when the plaintiff himself is guilty of fraud.

The right of a person or firm to a trade-mark is acquired by exclusive user. The first person who takes the name and applies it to the goods, or to anything of a mercantile character, will have the exclusive right, which right equity will protect. The prior use is enough to entitle him, even although it has only been for a very short time. A liquorice maker stamped his sticks with the word "Anatolia," and about the beginning of September, 1861, put his goods on the market with this symbol on them. Less than two weeks after, a rival candy-maker commenced to stamp his liquorice with the same word. Liquorice man No. 1 was able to enjoin his imitator. "It has been pressed," said the court which granted the injunction, "that the plaintiff had no time to acquire a property in this trade-mark, property in a mark of this kind requiring antecedent user to establish a repute in the name. It was not, however, necessary to say when property in such a mark was capable of being acquired; probably it might be necessary, to support a bill of this kind, that the mark should have been applied to the goods rightfully by the plaintiff; secondly, that the article to which it is applied should be an article vendible in the market; thirdly, that the defendant knowing this, has imitated it for the purpose of passing goods into the market." *McAndrew v. Basset*, 12 W. R. 777; 10 L. T. (N. S.) 65. But it has been ruled that property in a trade-mark cannot be acquired before the article is actually put upon the market for sale — until that time any one may use it, and obtain the exclusive right to it. *Maxwell v. Hogg*, L. R. 2 Ch. App. 307.

But it is not every word or phrase that may be the subject of a trade-mark. "I have not the least doubt," said an English judge in one case, "that if the plaintiff has invented a fanciful and ridiculous name — and the more ridiculous the better it is for his business — and has used it in his trade, that the court would take care that nobody else should use that absurd name; for such user could only be a user for the express purpose of imitating the plaintiff's, and so defrauding the plaintiff, by representing the goods manufactured by one person to be the goods manufactured by another." *Young v. Macrae*, 9 Jur. (N. S.) 322. It is better that the word should be absurd, — it is necessary that it should be to some extent fancy, — for unless a man has an exclusive property in the article itself, he cannot have a trade-mark in its proper name. Thus

“paraffine” having come to be an article of commerce, it has been held that one could not appropriate the word as a trade-mark; and the same was held of “Cundurango Ointment,” ointment being a generic term, and Cundurango the name of a well-known plant. But a person may apply a common name to an article not at all descriptive of the article, and which word has been applied to articles of other kinds, and it will constitute a valid trade-mark—as for example, “Excelsior” Soap. *Braham v. Bustard*, 1 H. and M. 447.

TRADE-MARKS — FAMILY NAMES USED WITHOUT INTENT TO DECEIVE.

MENEELY v. MENEELY.

[1 Hun, 367; 62 N. Y. 427.]

Andrew and Edwin A. Meneely were bell manufacturers in Troy, New York, the business after the death of Andrew being carried on by Edwin and George R. Meneely. The Meneely bells became very celebrated, and it was therefore with considerable disgust that the firm found out one day that Clinton Meneely and one Kimberly were about to start a rival bell foundry in Troy. But it was not long until the new works were in full blast and the bells of "Meneely & Kimberly" were being cast and sold to any one that wanted a bell. The old firm tried to enjoin the use of the word Meneely by the new firm, but failed. "Every man," said the court, "has the absolute right to use his own name in his own business, even though he may interfere or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the courts will not interfere. A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other per-

sons of the same name from using their own names in their own business.”

Meneely v. Meneely is an interesting case as showing that, in the case of using family names by persons entitled to use them, the power of the court will only be interposed where there has been fraud or deceit practised, or where some fraudulent device has been employed to injure the business of another, and impose on the public. This case does not conflict with *Croft v. Day*, for the principle is the same in both, for in *Croft v. Day* the defendants were not enjoined from using their names at all, but in so using them in connection with bottles and labels like the plaintiffs as to deceive the public.

STATEMENTS AS TO FORMER EMPLOYMENT.

GLENNY v. SMITH.

[2 Drew. & Sm. 476.]

One of the employees of Thresher; Glenny & Co., hosiery and shirt makers, of the Strand, London, who rejoiced in the unromantic name of Smith, left their service and opened a shop for himself on another street in the same city. Over the door of his shop he put his own name "Frank P. Smith," but on the awning and doors he added the words "From Thresher & Glenny," being careful to put the word "from" in very small letters, not likely to attract attention. It also appeared that in the middle of the day, when the awning was let down to keep out the sun, it entirely shut off from view the name of Mr. Smith over the door. Under these circumstances it was not strange that several customers went into Mr. Smith's shop in the belief that it was a shop of Thresher & Glenny. This somewhat incensed the latter firm, and they applied to the Court of Chancery to have Mr. Smith restrained from using their names in this way. Mr. Smith replied that he had intended no deception, and had even gone so far as to instruct his clerks not to permit customers to buy under the impression that they were buying from Thresher & Glenny. "There

is no question," said the Vice-Chancellor, in deciding the case, "but that if a man, having been in the employment of a firm of reputation, sets up in business for himself, he has a right in any way in which he thinks fit (provided he does not deceive), to inform the public that he has been in such employment, and in that way to appropriate to himself some of the benefit arising from the reputation of his former employers. But in so doing he must take special care that it is done in such a way as not to mislead the public to the detriment of his former employers. It does not signify, for the purpose of the plaintiff's right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public, * * * and it is not the question whether the public generally, or even a majority of the public, is likely to be misled; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled."

Tested by these rules, the court came to the conclusion that on the evidence in the case, deception was probable, and enjoined Mr. Smith from using the firm name as he had been doing.

The law on this subject is so well laid down in the above case that no further explanation is necessary here. The case is interesting in showing that the intention of the defendant to deceive the public is not the gist of the relief, but that the probability that the public will be deceived is. A man who has been employed by a firm of reputation, may use their name for the purpose of informing the public that he comes before them recommended by the fact of having been employed by an establishment of admitted reputation, but when he advertises this by signs on his store, he must be very

careful not to let it be supposed that they are the proprietors. The safest plan would be to give such words as "from," "late with," "formerly of," equal prominence on the signs with the name of the late firm.

PART II.

CONSTITUTIONAL CASES SIMPLIFIED.



CONSTITUTIONAL CASES.

CHAPTER I.—GENERAL PRINCIPLES.

*GENERAL LIMITATIONS IN CONSTITUTION DO
NOT APPLY TO THE STATES.*

BARRON v. THE MAYOR OF BALTIMORE.

[7 Pet. 243.]

Mr. Barron, of Baltimore, was the owner of a wharf which derived its popularity from its enjoying the deepest water in the harbor. This reputation, however, was destined to be short-lived, for the city in grading some streets, directed from their accustomed ways several streams of water which carried down to Mr. Barron's wharf so much mud and sand as to render the water so shallow that no more vessels were able to come there. When Mr. Barron asked to be compensated for his lost wharfage dues, the city pointed to its charter, which justified it in doing exactly as it had done. Then Mr. Barron went to law alleging that the city had taken his property "without just compensation," and that as the United States Constitution prohibited this very thing in express words, the city must pay him.

It was held, however, that as it was the State, and

not the United States, which had done the act, the prohibition did not apply. The general limitations contained in the United States Constitution, the court said, had reference to the National government and did not apply to the States at all.

The United States Constitution, besides granting many powers to the general government, contains very many limitations to its power as well. For example, it prescribes that no form of religion shall be established; nor the free exercise of religion be prohibited; that the freedom of the press or of speech shall not be abridged; that the right of the people to keep and bear arms shall not be infringed; that soldiers shall not in time of peace be quartered in houses without the consent of the owners, nor in time of war, except in the manner prescribed by law; that unreasonable searches and seizures of persons, houses, papers and effects shall not be made; that no warrant shall be issued except upon probable cause, supported by oath, and particularly describing the place to be searched and the persons and things to be seized; that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia when in actual service in time of war or public danger; that no person shall be subject for the same offence to be put twice in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State, and in the district wherein the crime shall have been committed, and must be informed of the nature and cause of the accusation, and must be confronted with the witnesses against him, and may have compulsory process to obtain his own witnesses, and may have the assistance of counsel in his defence; that the trial by jury shall be preserved in suits at common law, where the value in controversy shall exceed twenty dollars, and that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted.

Barron v. Mayor of Baltimore is important as deciding that these limitations are addressed to the *Federal government only*, and do not bind the States. "The Constitution," said Chief Justice MARSHALL in that case, "was ordained and established by the people of

the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. * * * They must be understood as restraining the power of the general government, not as applicable to the States. In their several Constitutions they have imposed such restrictions as their own wisdom suggested, such as they deemed most proper for themselves." As a matter of fact, most of the State Constitutions, copying the Federal Constitution in this respect, contain similar provisions limiting the power of the Legislatures. But if they do not, the Federal Constitution cannot be appealed to, to protect a person against State legislation.

There are, however, certain limitations in the Federal Constitution on the powers of the States. Thus, it is declared in sect. 10, that no State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility; also that no State shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, or lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. By the Fourteenth Amendment to the Constitution, certain other limitations are placed upon the power of the States. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

As to all these latter provisions, the Federal courts will consider the question whether a State law conflicts with them, and if it is found to do so will declare it unconstitutional and void.

*IMPLIED POWERS.***McCULLOCH v. THE STATE OF MARYLAND.**

[4 Wheat. 316.]

About the year 1816, Congress established a United States Bank, for the purpose of assisting the government in the management of its finances. There was great opposition to the measure, and the question of the constitutionality of such an act came at last before the Supreme Court of the United States for decision. The bank contended that, although the Constitution did not, in express terms, authorize Congress to establish a national bank, yet it had given it power to borrow money, collect taxes, and pay the debts of the nation,¹ and had expressly authorized Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,"² and this it argued was authority enough. The enemies of the bank, on the other hand, took the ground that "necessary" meant indispensable, and as all the acts named could be performed without a bank, the creation of the United States Bank was unconstitutional.

The court held the act valid, on the ground that such an institution was a legitimate means of carrying out the general powers given to Congress, and that the degree of its necessity was a question for the Legislature

¹ Const. Art. I, sect. 8.² Const. Art. I, sect. 18.

and not for the court. "We admit," said Chief Justice MARSHALL, "as all must admit, that the powers of the government are limited, and that the limits are not to be transcended. But we think the sound construction of the Constitution must allow the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The government of the United States is one of limited powers. It has strictly no powers except such as are given to it in the Constitution of the United States. Herein it differs from the States, which have all powers, except such as have been conceded by the people to the general government. "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given or given by necessary implication." *Martin v. Hunter's Lessee*, 1 Wheat. 304. When any act is attempted by the National government, authority for that act must be found within the Constitution. Two important principles have been incorporated on this general rule.

1. Within the scope of the functions assigned to it, over the subjects committed to its care, the power of the National government is absolute and supreme.

2. The Constitution does not descend to a minute description of the powers given to the National government; it uses only general terms. It contains a list of the grand objects and purposes which are committed to it, but does not attempt to define all the means and methods by which those objects may be attained, but leaves it to Congress to adopt its own means. A few instances and illustrations of this will suffice. Congress is authorized to borrow

money; it is not expressly authorized to establish a bank, but this is one method of borrowing money, and hence as held in *McCulloch v. Maryland*, it has power to establish a United States bank. Congress is authorized to lay taxes, duties, imposts and excises. A protective tariff is not absolutely necessary for levying taxes; but it is one way of exercising that power, therefore, Congress has power to impose a tariff duty. Again the Constitution gives Congress power "to regulate commerce." Strictly, this would seem to mean that it should pass only such laws as were absolutely necessary to the regulation of commerce, such as laws compelling the registration of vessels, prescribing the duties of owners and seamen, and the government of ports, harbors, and the like. "Yet," as Mr. Pomeroy puts it, "under this grant Congress has assumed to enact laws for the improvement of harbors, the construction of piers, the erection of an astronomical observatory, the conduct of a coast survey. It has invaded the common law by limiting the liability of carriers on the ocean and the great lakes, it has sent out expeditions to observe an eclipse, and to explore the topography of the Dead Sea." Pomeroy Const. L. 166

CHAPTER II.—THE POWER OF TAXATION.

EXTENT OF THE TAXING POWER.

PROVIDENCE BANK v. BILLINGS.

[4 Pet. 514.]

In the year 1791 the Rhode Island Legislature chartered the Providence Bank to carry on the banking business as a corporation in the State. In 1822 the Legislature passed an act imposing a tax on every bank in the State except the United States Bank. The Providence Bank resisted this tax, and attempted to show the Supreme Court of the United States that it was unconstitutional.

“The State,” argued the bank lawyer, “gave us a charter to carry on the banking business. True, no promise was made in the charter that we should not be taxed; but we claim that it was an implied contract that it would pass no law which would interfere with our operations. Now, if the State may tax us, it may compel us to close our doors, for it may tax us to such an extent that we cannot profitably carry on business any longer.”

“So it may,” answered the court, “for such is the extent of the taxing power of a State. The power of taxing operates on all persons and property. It is

granted by all for the benefit of all. It resides in the government as a part of itself, and need not be reserved, where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. Every person must bear his portion of the public burdens; what that portion shall be must be determined by the Legislature, whose discretion, even when abused, cannot be corrected by the courts."

And so the bank had to pay the tax.

Taxes, as some philosopher has remarked, are the penalties which people have to pay for being too fond of glory. The power to tax is an incident of sovereignty; it resides in every government; for, if it were not so, no government could exist very long, for it would be without power to raise money for its own maintenance. And (with some exceptions, which will be stated below), the extent of its exercise is unlimited; if the government, the people's representatives, decide to levy a tax, the amount is entirely in their discretion, and, no matter how onerous it may be, there is no power in the courts to help a citizen, though his last dollar may be taken from him under this guise. "The power of taxing the people and their property," said the greatest of American Chief Justices, "is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives to guard them against its abuse." MARSHALL, C. J., in *McCulloch v. State of Maryland*, 4 Wheat. 428. The people cannot go to the courts to set aside the obnoxious tax; but they have after all an easy remedy—when the next election comes on they can retire their representatives who have put the burden on them, and send men to the Legislature who will vote for its repeal.

The exceptions to this general rule are: —

I. Where the Constitution prescribes a limit to the exercise of the power.

II. Where the tax is not imposed for a public object.

III. Where the State has relinquished its right by contract.

IV. Where the property is beyond its jurisdiction.

I. *Where the Constitution prescribes a limit to the exercise of the power.* The people have not always been willing to trust this unlimited power to the government. Therefore, in many of the State Constitutions, as in also the Constitution of the United States, it is prescribed that the Legislature shall not tax beyond a certain amount, or only for certain purposes. If the government passes a law conflicting with these constitutional limitations, the courts, in a case of the kind being properly brought before them, will declare the law void, and will prevent the tax from being collected. The Constitution of the United States contains limitations on both the powers of Congress and the States in respect to taxation, viz.:—

Art. I., sect. VIII. "Congress shall have power to levy and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Art. I., sect. II., § 3. "Direct taxes shall be apportioned among the several States which may be included in this Union according to their respective numbers. See *Hylton v. U. S.*, *post*, p. 194.

Art. I., sect. IX., § 4. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Art. I., sect. IX., § 5. "No tax or duty shall be laid on articles exported from any State.

Art. I., sect. IX., § 6. "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from one State, be obliged to enter, clear or pay duties in another. See *Brown v. State of Maryland*, *Almy v. State of California* and *Woodruff v. Parham post*, p. 197.

Art. I., sect. X., § 1 "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, ex-

cept what may be absolutely necessary for executing its inspection laws.

Art. I., sect. X., § 3. "No State shall, without the consent of Congress, lay any duty on tonnage."

II. *Where the tax is not imposed for a public object.* For an instance of a tax of this kind, see *Loan Association v. Topeka*, *post*, p. 192.

III. *Where the State has relinquished its right by contract.* This principle is discussed and illustrated in the subsequent chapter on PROPERTY RIGHTS.

IV. *Where the property is beyond its jurisdiction.* "The authority to tax," it has been said by the Supreme Court, "extends to all persons and property within the sphere of its territorial jurisdiction. * * * But where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If a Legislature of a State should enact that the citizens or property of another State or county should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." *St. Louis v. The Ferry Co.*, 11 Wall. 423.

TAX MUST BE FOR PUBLIC PURPOSE.

LOAN ASSOCIATION v. TOPEKA.

[20 Wall. 655.]

The City of Topeka, Kansas, obtained authority from the Legislature to issue bonds to encourage the establishment of manufactures within its limits. An iron works company attracted by these inducements established its works in Topeka, and to it the city issued \$100,000 of bonds as a bonus. The company began to look upon a Kansas city as a pleasant community to live among; but, alas, everything was changed when, an action being brought on one of these bonds, it was decided that the law under which they were issued was unconstitutional. The court said that giving the city power to donate its bonds to manufactories, was the same as giving it power to tax the inhabitants for that purpose, for only by a tax could the bonds be paid. But a valid tax must be imposed for some *public* object — *i. e.* an object within the purposes for which governments are established. The taxing power cannot, therefore, be exercised in aid of enterprises strictly private for the benefit of individuals, although in a remote or collateral way the local public may be benefited thereby.

To justify the exercise of the taxing power it is absolutely necessary that the expenditure which it is intended to meet shall be for some public service or some object which concerns the public welfare. That the public will be incidentally benefited is not

enough, especially where the incidental benefit is only what the public may receive from the industry and enterprise of individuals. *Loan Association v. Topeka* is a good example of a tax of this kind, and two cases in the State courts also furnish apt illustrations of what are not public purposes within this rule. The great fire in Boston in 1872, caused the Legislature of Massachusetts to pass a law authorizing the City of Boston to issue bonds, and lend the proceeds on mortgage to the owners of land, the buildings on which had been burned. The purpose was, of course, to assist the sufferers in rebuilding on their land, and thus to, in some measure, benefit the whole city. *Lowell v. Boston*, 111 Mass. 455. The grasshopper having pretty well cleaned out the crops in Kansas one year, the State authorized counties to issue bonds for the purpose of providing destitute farmers with seed for the next sowing. *State v. Osawkee Township*, 14 Kas. 418. But the Boston property holders had to find their money elsewhere, and the Kansas farmers had to buy, beg or borrow their seeds; for both statutes were declared void.

*WHAT ARE "DIRECT TAXES."***HYLTON v. UNITED STATES.**

[3 Dall. 171.]

Exactly what Mr. Hylton, of Virginia, found to do with one hundred and twenty-five carriages (which the report says he kept "exclusively for his own separate use and not to let out to hire or for the conveyance of persons for hire") is a query which it is hard to answer, except on the theory that he was the proprietor of a circus. Just one year before, Congress had laid a tax of \$10 on all carriages in the United States, and consequently Mr. Hylton found that keeping one hundred and twenty-five carriages was more of a luxury than he could pay for, and he attempted to dispute the legality of the tax in the courts.

He relied on a section of the Constitution which says that "direct taxes shall be apportioned among the several States according to their respective numbers," and he claimed that this carriage tax was a "direct tax." But the Supreme Court of the United States thought otherwise. "The direct taxes contemplated

by the Constitution," said Mr. Justice CHASE, "are only two, viz. : a capitation or poll tax simply, without regard to property, profession or other circumstance, and a tax on land.

The word "taxes" embraces all the impositions made upon the person, property, occupation or privileges of the people by the government for the purpose of raising revenue. "Duties" and "imposts" are within the term, but for greater particularity they are generally applied to the sums of money demanded by the government for the privilege of importing or exporting merchandise. "Excises" are also "taxes," but this word is applied to the taxes laid upon the manufacture, sale or consumption of commodities within the country, and upon licenses to pursue certain occupations.

As the words are generally used, taxes are "direct" when they are assessed upon the persons, property, business or income, etc., of the people, and are "indirect" when they are levied on commodities before they reach the consumer, and are paid by him only as he pays a higher price for them than he would if there were no tax. The former, if he comes within its terms, the citizen cannot get out of paying; the latter he may escape, if he wishes, by abstaining from using the articles which have been taxed.

Hylton v. United States decides that the phrase "direct taxes" in the Constitution has a more restricted meaning: that it includes only two kinds of taxes, (1) a tax on land; (2) a capitation or poll tax, i.e., a fixed sum of money to be paid by each person, without reference to his property or business. Therefore, if Congress was to wish to levy either of these kinds of taxes, it would have to first fix the whole amount of money to be raised in this manner, and then divide it among all the States in proportion to the number of inhabitants in each. As this would be a work involving a great deal of calculation and adjustment, Congress has never yet tried this method of taxing, though in two cases since *Hylton v. United States* was decided, it was contended that an income tax, and a tax on the circulation of banks, which the Federal government had levied, were "direct taxes," and ought to have been apportioned among the States. *Pacific Ins. Co. v. Soule*, 7 Wall. 433; *Veazie*

Bank v. Fenno, 8 Wall. 533. But the Supreme Court held that neither of them was within the phrase as used in the Constitution, adhering to its definition of a "direct" tax in the *Carriage* case.

*STATE DUTIES ON IMPORTS.***BROWN v. STATE OF MARYLAND.**

[12 Wheat. 419.]

A statute of Maryland required all importers of foreign goods by the bale, package, etc., and all other persons selling the same by wholesale, bale, package, etc., to take out a license for which they were charged \$50, and prescribed a penalty for neglect to do so. A Baltimore merchant named Brown imported and sold a package of foreign dry goods without having taken out a license, and he was prosecuted under the act. His defence was that the statute was unconstitutional, because it violated the provision prohibiting a State from levying "any imposts or duties on imports or exports."

Brown won his case; the statute was declared void. An imported article, the court held, continues to be part of the foreign commerce of the country while it remains in the hands of the importer for sale in the original bale or package in which it was imported. The right of the citizen to import necessarily implies the right to sell the article in the form and shape in which it was imported, and no State, either by a direct tax on the article, or by requiring a license from the importer before he is permitted to sell, can impose any

burden upon him or the property beyond what Congress has imposed by its tariff laws.

But an imported article becomes subject to the taxing power of the State when the original package is broken open for use or for sale in parts, or when it has passed from the hands of the importer into those of a purchaser. It then ceases to be an "import."

*STATE DUTY ON "EXPORTS."***ALMY v. STATE OF CALIFORNIA.**

[24 How. 169.]

A statute of California imposed a stamp tax on all bills of lading of gold and silver exported from the State. Almy, the master of the ship *Rattler*, received a quantity of gold in the port of San Francisco for transportation to New York, for which he signed a bill of lading without attaching a stamp. The law made this a misdemeanor, and he was indicted and fined \$100 for the offence. But he appealed to the Supreme Court of the United States, where he was discharged and the fine set aside.

It was a tax on "exports," said the court. It was the same as though the tax had been on the gold itself, for the bill of lading is as necessary to the transportation of goods, as casks or boxes,—it is the ship's receipt for the articles received, without which no one would intrust his goods to a carrier. "The intention to tax the export of gold and silver in the form of a tax on the bill of lading is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge."

WOODRUFF v. PARHAM.

[8 Wall. 123.]

Mobile, also, about the year 1865, being authorized by its charter, levied a tax on all sales at auction. An auctioneer named Woodruff received from States other than Alabama large amounts of goods and merchandise, which he sold in Mobile to purchasers in their original and unbroken packages. Parham, the city tax collector, demanded the tax on these sales; but the auctioneer refused them and had to be sued. In the Supreme Court, Woodruff contended that the tax was unconstitutional for the reasons stated in *Brown v. Mayland*. But the court upheld the tax, on the ground that the word "imports" in this clause of the Constitution referred only to articles imported from foreign countries into the United States, and not to goods imported from one State into another.

Woodruff v. Parham, while agreeing with *Almy's* case on one point, is in conflict with it on another. "It seems to have escaped the attention of counsel on both sides in *Almy's* case, and of the Chief Justice in delivering the opinion," says Mr. Justice MILLER in *Woodruff v. Parham*, "that the case was one of inter-state commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. * * * The only question discussed by the court is whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And in arguing this proposition the Chief Justice says that 'a bill of lading or some equivalent instrument of writing is invariably associated with every cargo of merchandise exported to a foreign county, and consequently a duty upon that is in substance and effect a duty on the article exported.' It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce,

and, there is no reason to suppose that the question which we have discussed was in his thought." The court, therefore, has overruled *Almy's* case so far as it held that articles exported from one State to another were "exports" within the Constitution.

*STATES CANNOT TAX FEDERAL AGENCIES.**McCULLOCH v. THE STATE OF MARYLAND.*

[4 Wheat. 316.]

The opposition to the United States Bank¹ took various shapes. The bank had a branch at Baltimore. The State of Maryland passed a law which had the effect of levying a tax on every note issued by the bank within the State. Mr. McCullough, who was the cashier of the Baltimore branch, refused to obey this law, and being sued by the State for the penalty, judgment was recovered against him, which judgment was affirmed by the Maryland Court of Appeals. Then the case was taken to the Supreme Court of the United States, in which tribunal the State law was declared unconstitutional and void. The court held that the sovereign power of a State extends to everything which exists by its authority or is introduced by its permission, but does *not* extend to those means which are employed by Congress to carry into execution the powers conferred on the National government. If the State could tax these government agencies it might destroy them, for it might tax them to such an extent as to prevent their operation.

¹ See *ante*, p. 185.

DOBBINS v. COMMISSIONERS OF ERIE COUNTY.

[16 Pet. 435.]

Captain Dobbins, of the United States revenue cutter, lying at the station at Erie, Pennsylvania, was notified by the county assessor one day, that there was a matter of \$10.75 due from him to the county, by virtue of a statute of Pennsylvania which authorized the levying of a county tax on all "offices and posts of profit," for that the Captain's post was one of profit, was sufficiently clear to the tax-collector. But Captain Dobbins refused to pay, and the next thing that we hear of him is as a successful appellant in the Supreme Court of the United States, where the judgment was against the validity of the statute.

The reason of the tax-collector's defeat is very brief. An officer of the United States is a government instrument; and a government instrument, as was decided in *McCullough v. State of Maryland*, cannot, as such, be taxed by a State.

WESTON v. CITY COUNCIL OF CHARLESTON.

[2 Pet. 449.]

The city council of Charleston, South Carolina, in the year 1823, with authority from the State Legislature, levied a tax on all personal estate, including stocks of the United States. Mr. Weston, who was the owner of some United States stock, was assessed thereon. But not a cent of tax had he to pay, for the

court decided that stocks of the United States, owned by private persons or corporations, cannot be taxed by a State. The National government is given by the Constitution the power to borrow money; the States, therefore, cannot prevent or interfere in any way with the exercise of this power. But to tax the evidences of the National debt in the hands of the owners, would interfere with its power to borrow money, for it would diminish their value, and thus make it harder for the government to find persons willing to loan it their money.

CRANDALL v. STATE OF NEVADA.

[6 Wall. 35.]

A statute of Nevada imposed a tax of \$1 on every person leaving the State by any railroad, stage-coach, or other public vehicle. The tax was to be paid by the carriers, and they were required, under a penalty, to report monthly the number of persons so transported. Crandall, who was the agent of a stage company, refused to report or to pay the tax, and being brought before a State court was fined. But he appealed to the Supreme Court of the United States, where the statute was held void. "The United States," said the court, "has the right to call for the services of its citizens at all points throughout the country, and to transport its troops anywhere. Citizens have the right to go to the seat of government, and to all other places where Federal offices are situated, and to ports of entry, as the necessities of their business may require. If the State could tax this privilege at all, it could tax it

to such an extent as to render it impossible to exercise it.’’

These cases firmly establish the principle that the power of a State to tax cannot be exercised upon property of the National government, or upon means which that government has adopted to carry on its public affairs. As the amount which a State may raise by taxation, cannot, as we have seen, be prescribed or limited by the courts, — but the State is supreme in this matter unless restricted by its Constitution, — if it were once conceded that the National property or agencies were a proper subject of the taxing power, that power might be exercised to the complete destruction of both.

*UNITED STATES CANNOT TAX STATE
AGENCIES.*

COLLECTOR v. DAY.

[11 Wall. 113.]

In 1864 it was enacted by Congress that, on all the incomes above \$1,000, of persons residing in the United States, there should be levied and collected a tax of five per cent. Among those who were assessed under this law was Judge Day, of the Probate Court of Barnstable, Massachusetts, and, although he paid the tax, he paid it under protest, and brought an action against the collector to recover it back, on the ground that his income which was taxed was his salary as a State officer, and that the United States had no more right to tax his salary than the State of Pennsylvania had to tax Captain Dobbins' and for similar reasons. The Supreme Court said he was right in his law, and ordered the collector to refund him his money.

This case is very important as deciding that the doctrine that the States may not lay taxes upon the instrumentalities and agencies of the nation (see *McCulloch v. Maryland*, *ante* p. 202, and cases *seq.*) applies in the same manner, to the same extent, and for the same reason, to the exercise of the taxing power of the United States. Congress cannot lay a tax upon any of the agencies or instrumentalities which are necessary or appropriate for the legitimate governmental acts and operations of the States.

Previous to this decision the principle had been much debated in the State courts. Several years ago Congress laid a stamp tax on written instruments, and among them papers used in judicial proceedings. The law provided that if a revenue stamp of a certain

value was not affixed as required, the paper lacking such stamp should not be used in the suit or in the course of the proceeding. When it was sought to apply this law to papers filed or used in evidence in the course of proceedings in State courts, the State courts pronounced the law void so far as it extended to them, on the ground that Congress could not interfere in this way with the administration of justice in a State. *Warren v. Paul*, 22 Ind. 276. The law was repealed and the question never reached the Federal Supreme Court, but the subsequent case of *Collector v. Day* shows that if it had, the views of the State courts would have been sustained.

*DUTY OF TONNAGE.***CANNON v. NEW ORLEANS.**

[20 Wall. 577.]

An ordinance of the City of New Orleans required to be paid as "levee dues," by all steamboats which should moor or land in any part of the port, ten cents per ton, if the boat were in port not exceeding five days, etc. The owner of the steamboat R. E. Lee refused to pay the dues, and appealed to the Supreme Court of the United States, where the ordinance was declared void as being a "duty of tonnage."

PACKET COMPANY v. KEOKUK.

[5 Otto, 80.]

At a considerable expense, the City of Keokuk, Iowa, had built, paved and improved the banks of the Mississippi within its limits, and had erected wharves for the convenience of vessels landing there. For the use of these wharves, the city (under authority from the State), declared that every vessel that should make fast to them, or receive or discharge passengers or freight thereon, should pay certain fees graduated by the tonnage of the vessel. The boats of the Packet Company which ran on the river and used the city's wharves, refused to pay these fees, and on being sued for them, claimed that they were "duties of tonnage,"

and therefore (as held in *Cannon v. New Orleans*) beyond the power of the State to impose.

But the court decided that the fees were demanded for services rendered, viz. : providing the boats with wharves, and were valid and collectible.

Section 10, Art. I., of the Constitution declares that "no State shall, without the consent of Congress, lay any duty of tonnage." It is, therefore, not competent for a State or State's agent (*e. g.* a municipal corporation) to levy dues upon vessels, measured by their capacity, or to impose any duties upon them for the privilege of entering or remaining in or leaving a port. This is the general rule; yet there are two ways in which levies may be made on vessels by a State, viz. :

1. *Where the levy is for special services rendered.* "A charge for services rendered," said Mr. Justice STRONG, in the *Packet Company* case, "or for conveniences provided is in no sense a tax or a duty. It is not a hinderance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hinderances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or duty that is prohibited; something imposed by virtue of sovereignty not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast or at which they may conveniently load or unload is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not at its election, and thus may incur liability for wharfage or not at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf." Right here is the difference between *Cannon's* case and the *Packet Company's* case.

The charge in the first was made by the City of New Orleans, for stopping in the harbor, even though no wharf was used; while the tax which Keokuk collected was for using wharves which the city had erected at great expense. The former was void, the latter valid.

2. *Where the levy is a tax on property as other property is taxed in the State.* Property in ships and vessels is like all other property, and is, therefore, subject to be taxed. Therefore the State may tax the owners of vessels on their interests in them as property by the same standard employed in other cases. But it is essential (as we have seen, *ante* p. 191) that the vessels shall have their *situs* within the State that taxes them. There was a ferry company whose boats carried goods and passengers across the Mississippi river from East St. Louis, which is in Illinois, to the City of St. Louis, which is in Missouri. The company was an Illinois corporation; its boats were laid up when not in use, and its pilots and engineers resided, on the Illinois side of the river. It was held that the State of Missouri could not tax these ferry-boats. *St. Louis v. The Ferry Company*, 11 Wall. 423.

CHAPTER III. — THE POWER TO BORROW MONEY.

“BILLS OF CREDIT.”

CRAIG v. THE STATE OF MISSOURI.

[4 Pet. 410.]

In 1821 the Legislature of Missouri authorized the State Treasury to issue certificates to the amount of \$200,000, in denominations not exceeding ten dollars nor less than fifty cents. These were subsequently issued, and were in the following form : —

“This certificate shall be receivable at the treasury of any of the loan offices in the State of Missouri, in discharge of taxes or debts due to the State for the sum of —— dollars, with interest for the same at the rate of two per centum per annum from this date.”

Some of these certificates the Treasury issued to Craig and others, who gave their promissory note to the State for the amount. When the note fell due, they did not pay it, and on being sued they pleaded that

the consideration was void because the certificates were void, being "bills of credit" which, by the Constitution, the States are prohibited from issuing. In the Supreme Court of the United States it was held that the certificates, even though they were not made a legal tender, or directed to pass as money or currency, were "bills of credit," and consequently void.

BRISCOE v. THE BANK OF THE COMMONWEALTH OF KENTUCKY.

[11 Pet. 257.]

The Legislature of Kentucky, in 1820, established the Bank of the Commonwealth of Kentucky in the name and behalf of the Commonwealth and the institution was declared to be exclusively the property of the Commonwealth. The president and directors were to be chosen by the Legislature, and the bank was authorized to issue notes which were to be receivable in payment of debts to the State. One day, in 1830, Briscoe and some others induced the bank to discount their note for something over \$2,000 at four months, receiving the amount in bills of the bank. The four months went by, the three days of grace expired, without the note being met, and the directors were obliged to bring suit on it. Briscoe and his co-makers made the same defence that Mr. Craig did in his contest with

the State of Missouri; they said that the bills which they had received were "bills of credit" of the State and void.

But they were not as lucky as Mr. Craig, for, although Mr. Justice STORY agreed with them, the rest of the court held that the notes of the bank were not "bills of credit." The bank and the State, they said, were distinct; the notes were issued by the former upon its credit, alone, and could only be enforced against it; they were not issued by the State and contained no pledge of the State's credit. Mr. Justice STORY took the very sensible view that what the State could not do directly, it should not be allowed to do indirectly by means of an institution created by itself, but the other six judges could not see it in this light.

By Article I, sect. 10, of the Constitution, it is provided that no State shall "coin money or emit bills of credit." The object of the prohibition against coining money was, of course, to have a uniform currency, which could only be accomplished by giving Congress the sole power to regulate the currency. The prohibition against emitting bills of credit grew out of the unpleasant experience which the Constitutional Convention had had in the matter of colonial bills of credit, and it did not intend that each State should have the right to put in circulation its paper obligations to be perhaps depreciated and finally dishonored.

It is plain that the phrase, "bills of credit," is broad enough to include all written contracts by which a State binds itself to pay money at a future day in consideration of services rendered or loans made. But a more restricted interpretation has been given to these words in the Constitution, otherwise no State would have power to issue bonds, or any evidences of debt. "Bills of credit," as used in the Constitution, are bills issued by the State, involving the faith of the State and designed to circulate as money in the ordinary course of business. As seen in *Craig v. State of Missouri*,

it is not necessary that the State should declare them to be money, or to be a legal tender. But the State may charter a bank and empower it to issue bills, as was laid down in Briscoe's case, *supra*.

CHAPER IV. — THE POWER TO REGULATE COMMERCE.

COMMERCE CANNOT BE REGULATED BY THE STATES.

GIBBONS v. OGDEN.

[9 Wheat. 1.]

As some small reward for his services in bringing the steamboat into practical use, the State of New York, by a statute of its Legislature, gave to Robert Fulton and his associates, the exclusive right to navigate all waters within the jurisdiction of the State with vessels propelled by steam, for a term of years. Notwithstanding this statute, one Gibbons ran a steamboat owned by him between New York City and Elizabethport, New Jersey, which steamboat had been duly enrolled and licensed as a coasting vessel under the act of Congress regulating the coasting trade. Ogden, who was the assignee of Fulton's rights under the New York statute, applied to the State court of New York and obtained from there an injunction restraining Gibbons from running his steamboat.

Gibbons appealed to the United States Supreme Court, and the statute was declared unconstitutional. It was a "regulation of commerce," said the court, and beyond the powers of a State.

THE PASSENGER CASES.

[7 How. 283.]

These were two cases — *Smith v. Turner* and *Norris v. City of Boston*, — which arose in New York and Massachusetts respectively. A statute of New York provided that the health officer of the port of New York should be entitled to demand, sue for and recover from the master of every vessel that should arrive at that port certain sums for every steerage passenger brought by the vessel from a foreign country, or from another State. The moneys thus received were to be applied towards the support of a marine hospital, and masters of vessels were subjected to penalties for failing to make the prescribed payments. A Massachusetts statute was similar in its general features. *Smith* was sued in New York, and *Norris* in Massachusetts, for violating these laws; and the defence in both cases was that the statutes were "regulations of commerce," and void.

The Supreme Court declared the statutes unconstitutional and sustained the defence.

**STATE OF PENNSYLVANIA v. THE WHEELING
BRIDGE COMPANY.**

[13 How. 518.]

The Wheeling Bridge Company were authorized by the State of Virginia to construct a suspension bridge across the Ohio River. When the bridge was completed it was found that it hindered the passage of boats ascending and descending the river, and at certain stages of water entirely prevented the transit of large boats. The State of Pennsylvania, seeing that her commerce was injured by the obstruction, brought an action to have the bridge removed as a nuisance. The Bridge Company justified its erection under the Virginia statute. Pennsylvania replied that the statute interfered with commerce, and was, therefore, void.

The court decided that this was so. It held that the power to regulate commerce between the States, given to Congress, extends to the navigable streams whereon that commerce is carried; that commerce included navigation; that Congress had recognized the Ohio as a navigable river, and the highway of commerce; that the bridge interfered with such navigation, and that the Virginia statute authorizing its erection was, therefore, in conflict with the power granted to and exercised by Congress.

And the court ordered that the bridge should be removed, unless within a certain time it should be raised to such a height as to admit all vessels at all stages of the water.

**STATE OF PENNSYLVANIA v. THE WHEELING
BRIDGE COMPANY.**

[18 How. 421.]

But the Bridge Company would not down. Instead of pulling down the structure, it induced Congress to pass a statute legalizing the bridge in its then condition and ordering it to stand at its old height. Pennsylvania was angry and asked the court to have the directors of the company committed for contempt in not carrying out the orders of the court. But the court held that the bridge was now legal, for Congress having power to regulate commerce, might place obstructions upon its free exercise at its discretion.

*EXCEPT AS TO LOCAL REGULATIONS.***COOLEY v. THE PORT WARDENS OF
PHILADELPHIA.**

[12 How. 299.]

A law of Pennsylvania made it the duty of every vessel, arriving from or bound to any foreign port or place, to receive a pilot, and prescribed certain duties to the masters of vessels in respect to such pilots. It also provided that a vessel which neglected or refused to take a pilot should forfeit a certain amount of

money, and one Cooley, the owner of the *Undine*, having brought himself within this provision, was proceeded against for the penalty. He pleaded that the law was unconstitutional, because pilot laws were laws "regulating commerce," and therefore beyond the power of a State to enact.

The Supreme Court said, that though it was true that pilot laws were regulations of commerce within the Constitution, yet that they were not therefore void. The power to regulate commerce, the court said, includes various subjects upon some of which there should be a uniform rule for the whole country, and upon others there may very well be different rules in different localities. In the first class of cases the power is exclusive in Congress; in the second, unless Congress legislates upon the subject, the States may. Pilot laws are regulations of commerce which may very well be different in different localities, and as Congress had never passed a uniform pilot law, the State laws on the subject were good.

WHAT IS "COMMERCE."

PAUL v. VIRGINIA.

[8 Wall. 168.]

A Virginia statute provided that no insurance company, not incorporated under the laws of the State, should carry on business in the State without a license, to obtain which it had to make a deposit of securities in

the State treasury. Mr. Samuel Paul was the enterprising agent in Virginia of some New York insurance companies, and he undertook to issue some policies without having obtained the above license. Mr. Samuel Paul came to grief; he was fined for his disobedience, and on appeal to the Supreme Court of the United States the judgment was affirmed.

The Supreme Court ruled that the Virginia statute was not a regulation of commerce, for the very good reason that issuing a policy of insurance was not commerce. "The policies," said Mr. Justice FIELD, "are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market, as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States."

Section 8, Art. I., of the Constitution, provides that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." In the confederation which preceded the Federal Union, Congress had no power over the subject of commerce, and each State made such laws on the subject as it saw fit to make. The result was disastrous. The competition between the different Commonwealths led to the passage of laws by each State which should increase its own trade at the expense of the others, and the framers of the Constitution, with great unanimity, agreed that commerce between the

States and foreign nations was a subject, beyond all others, to be dealt with by the general government, which had no interest in benefiting one State at the expense of another.

Commerce includes not only the buying, selling, and exchange of commodities, but also navigation by water and traffic by land. The subject-matter of traffic may be either goods or persons. (Mr. Justice BARBOUR went out of his way in *Miln's Case* to say that persons cannot be the subject of commerce, and that therefore laws regulating the transportation of persons by the State were constitutional; but this idea was speedily overruled by the Supreme Court.) On this point see *Paul v. Virginia*, *ante*, p. 219.

Gibbons v. Ogden, *The Passenger Cases*, and *The State of Pennsylvania v. The Wheeling Bridge Company* are the leading cases under this clause of the Constitution. *Brown v. State of Maryland* (*ante*, p. 197), which we have seen as construing the meaning of "duties on imports," is a much cited authority on this part of the Constitution also. There, it will be remembered, the State statute required all importers of foreign goods by the bale or package, selling the same by wholesale, to take out a license. The act was held void, first, because it laid a duty on imports, and secondly, because it was a "regulation of commerce."

But while the Constitution, as quoted above, gives Congress power to legislate on the subject, there is no express provision in the Constitution which inhibits the States from doing the same thing. The question then arises, is there any implied prohibition on the States from the fact that the power is given to Congress? The answer is, that there is to a certain extent. Two rules have been laid down by the Supreme Court, viz.: —

1. *Where the subject is of a national character, or capable of one uniform system or plan of regulation, the power of Congress is exclusive.* Here the States have no right to pass laws at all, even if Congress does not, for inaction on the subject by Congress is equivalent to a declaration that the commerce under its control shall be free and untrammelled, and hampered by no regulations at all.

2. *When the subject is of a local character the States may legislate, if Congress has not.* Pilot laws and harbor regulations are an example of this class of laws. See *Cooley v. Port Wardens*, *supra*. But it should be remembered that even these local subjects may be brought under the control of Congress at its discretion. The State laws are valid so long as Congress passes no laws of the kind, but as soon as the National government chooses to take

the subject under its control, the State laws cease to be of any authority.

On the other hand, there are two classes of cases in which the power of the *States* over commerce is exclusive, viz.: —

1. *Where the commerce is not extra-territorial.* On this see *Veazie v. Moor*, *post*, p. 223.

2. *When the regulation is within the police power of the State.* As to this see *City of New York v. Miln*, and *The License Cases*, *post*, p. 225.

*WHAT IS COMMERCE "AMONG" THE STATES.***VEAZIE v. MOOR.**

[14 How. 568.]

The river Penobscot is situated entirely within the State of Maine, having its rise far in the interior of the State. Its upper part is separated from tide water by falls impassable for purposes of navigation, and the river does not form a part of any continuous track of commerce between other States or foreign countries. The exclusive right to run boats on this part was granted by the State to Moor, whose rights were contested by Veazie, who considered the grant to Moor unconstitutional for the reasons in *Gibbons v. Ogden*.

In the Supreme Court the grant was held valid. The court said that commerce with foreign nations, which the States are prohibited from regulating, cannot be applied to transactions wholly internal — between citizens of the same community.

To constitute "commerce between States or foreign countries," it is necessary that it be not confined to one State exclusively. The ordinary trade of a State, the local buying, selling and exchange, the making of contracts and conveyances, the rules for the regulation of local travel and communication, and all the infinite variety of matters which are of local interest exclusively, are left wholly to the regulation of State law. The commerce of a State, which Congress may control and which a State must not, must in some stage of its progress be extra-territorial. "Nor," said Mr. Justice DANIEL in *Veazie v. Moor*, "can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of

foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase 'foreign commerce,' or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals or railroads from point to point within the several States toward an ultimate destination. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States, for it cannot be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of these facilities was unquestionably internal, although intermediately or ultimately it might become foreign."

A good illustration of this rule arose in 1869. Congress passed a law regulating the sale of illuminating oil, and imposing penalties for preparing, offering for sale, or selling it, except after it had been subjected to a prescribed test as a protection against explosion. The law was held inoperative within State limits. "The express grant of power to regulate commerce among the States," said the Chief Justice, "has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *U. S. v. Dewitt*, 9 Wall. 41.

COMMERCE AND THE POLICE POWER.

THE LICENSE CASES.

[5 How. 504.]

These cases were three in number, and were all considered by the court at the same time. In Massachusetts, Rhode Island, and New Hampshire there were statutes forbidding the sale of spirituous liquor, in less quantities than twenty-eight gallons, without a license. Thurlow, in Massachusetts, retailed some liquor without a license. Pierce, having purchased a small barrel of American gin in Boston, carried it to New Hampshire, where, not being licensed, he sold it in its original package. Fletcher, having purchased from the original importer some French brandy, sold it in Rhode Island without a license. Each was indicted and convicted, and all contested the conviction on the ground that the license laws were regulations of commerce, and beyond the power of the States to pass.

The court, for several reasons, decided that the laws were valid, the principal one being that they were police regulations and not regulations of commerce within the Constitution.

CITY OF NEW YORK v. MILN.

[11 Pet. 102.]

The State of New York passed a law which required, under a penalty, the master of every vessel arriving in

New York from a foreign country, or from a port in another State, to make a report in writing, within twenty-four hours, of the names, ages and last place of settlement of each passenger. The master of the ship *Emily*, from Liverpool, which arrived in New York one August day in the year 1829, with several hundred passengers, failed to make the report, and Miln, the owner, was sued by the city for the penalty. Miln defended his captain's act on the ground that the New York statute assumed to regulate commerce between the port of New York and foreign ports and was unconstitutional. But the court held that the statute was not a regulation of commerce but of police, and the statute was declared valid. "A State," said Mr. Justice BARBOUR, "has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States; by virtue of this it is not only the right, but the bounden and solemn duty, of a State to advance the safety, happiness and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. All these powers which relate to mere municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and consequently in relation to these the authority of a State is complete, unqualified and exclusive."

The police power of a State, and the matters properly falling

within it, are discussed more at length in a subsequent chapter, *post*, Chap. VI. In *City of New York v. Miln* and *The License Cases*, laws which it was endeavored to have nullified as regulations of commerce were held to be not regulations of "commerce" but of "police."

CHAPTER V.—PROPERTY RIGHTS.

A GRANT FROM THE STATE IS A CONTRACT.

FLETCHER v. PECK.

[6 Cranch, 87.]

A Georgia Legislature, by statute, made a grant of lands to certain parties. A subsequent Legislature of the same State revoked the grant on the ground of alleged corruption, and transferred the lands to other persons. The Supreme Court held that the second statute was void, because it impaired the obligation of a contract.

Section 10, Art. I., of the Constitution, provides that no State "shall pass any law impairing the obligation of contracts." "A contract," said Chief Justice MARSHALL, in *Fletcher v. Peck*, "is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of contract is performed. * * * A contract executed, as well as one which is executory, contains obligations binding upon the parties." A. agrees to pay a certain sum on a certain day, or to do or refrain from doing some act. B., for a consideration, gives C. a deed of lands. The contract of A. is executory, and that of B. is executed.

It was laid down in *Fletcher v. Peck*, that the term "contract" in the Constitution includes both executory and executed contracts; that a grant is an executed contract, and therefore *grants from the*

State to an individual are within the Constitution. These a State, by the Constitution, is prohibited from impairing, by altering, amending, or repealing the terms of the grants.

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*BUT NOT PUBLIC OFFICES.***BUTLER v. PENNSYLVANIA.**

[10 How. 402.]

On the first day of February, 1843, Mr. Butler was appointed by the Governor of Pennsylvania a Canal Commissioner, for one year from date, under a law then in force, which directed the Governor to appoint annually canal commissioners whose terms of office should commence on the first of February in every year, and whose compensation should be four dollars *per diem*. Mr. Butler gladly accepted the office, its emoluments and its duties, but in April of the same year the Legislature reduced his salary to three dollars a day, and ordered that on and after the following October, Canal Commissioners should be elected by the people instead of appointed. When the election came off Mr. Butler was not elected, and he had to step out to make room for the successful candidate.

Mr. Butler was not satisfied with his treatment, but claimed his salary at four dollars a day as of old, from the time the new law had been passed till the end of his term in February, 1844. He considered that the statute prescribing the length of his term and the salary he was to receive, constituted a contract with him which the State, by the subsequent law reducing his salary, and turning him out of office, could not impair. But he failed to persuade the court. "The contracts designed to be protected by the Constitu-

tion," said the Supreme Court, "are contracts by which perfect rights, certain definite, fixed private rights of property are vested. These are clearly distinguishable from the measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require."

The principle decided in this case was an important one. The court was called on to answer this question, whether, when the Legislature has created an office with certain salary and emoluments, and a person has been appointed to the office under the law for a certain term, and is fulfilling its duties, a subsequent Legislature can abolish the office before his term expires, or reduce the salary. *Baldwin v. Pennsylvania* decides that it can, provided there is nothing in the State Constitution which prohibits such a law, for the first statute is not a "contract" within the Federal Constitution.

*A LICENSE NOT A CONTRACT.***STONE v. MISSISSIPPI.**

[11 Otto, 814.]

Things are often tolerated in a community for years, when all at once the people become suddenly virtuous and abolish with great indignation something that had not before that appeared to bother anybody. When, in 1867, the Mississippi Agricultural and Manufacturing Aid Society were granted by the Legislature the right to run a lottery in the State for twenty-five years, the people of Mississippi, as represented by the Legislature, evidently did not see any particular harm in games of chance. In consideration of this grant the company paid into the State treasury \$5,000 and an annual tax of \$1,000. In 1870, however, the spasmodic return of virtue came, and the State passed a law prohibiting all kinds of lotteries within its limits. The company objected to being suppressed under this law, alleging that their charter constituted a contract on the part of the State to allow them to run a lottery for twenty-five years in consideration of the \$5,000 and the \$1,000 a year; and that this could not be abrogated by the State.

But the court said (1) that the State had made no "contract;" it had only granted a "license;" (2) that no Legislature could bargain away the police power of the State, and lotteries fell within that power.

Therefore, the company must go under, for the law abolishing it was valid.

The first point decided in *Stone v. Mississippi* is also very important. The principle decided there is that a license from the State authorizing a person to do an act which, but for such license would be forbidden, does not constitute a contract between the State and such individual which the State may not repeal or modify at its discretion. Licenses to sell spirituous liquors are a good illustration of privileges of this character. They are permissions to sell liquor, to carry on a trade which is prohibited to persons not having licenses, and this privilege may be withdrawn by the State at any time.

The second point, *i. e.* that relating to the police power of the State, is considered at more length in a subsequent chapter.

*CHARTERS TO PRIVATE CORPORATIONS.***DARTMOUTH COLLEGE v. WOODWARD.**

[4 Wheat. 518.]

Not long before the Revolution and the Declaration of Independence (it was when George III., was King of England), the Crown granted a charter incorporating Dartmouth College, in New Hampshire, specifying the number of trustees, how they were to be elected and hold their offices, what powers they should have, and what duties they should perform. In 1816, the Legislature of the State of New Hampshire passed a statute altering this charter in many important particulars, and making great changes in the organization of the college.

The question was whether the State could do this, and the Supreme Court held that it could not; for a charter was a contract. "This," said Chief Justice MARSHALL, "is plainly a contract to which the donees, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the security of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution and within its spirit also."

THE PLANTERS BANK v. SHARP.

[6 How. 301.]

In 1830, the Legislature of Mississippi chartered the Planters' Bank. The charter gave the bank power to possess, receive, retain and enjoy lands, goods, chattels and effects of what kind soever, nature or quality, and the same to grant, alien or dispose of for the good of the bank. A subsequent Legislature of the State passed an act forbidding every bank in the State from transferring any note of other evidence of debt.

The last statute was held void because it impaired the obligation of a contract.

Ne more important case, none more far-reaching in its results, has probably ever been decided by a judicial tribunal than the Dartmouth College Case. It laid down a great rule of Constitutional right which every day is becoming of wider application. Its name is familiar to thousands of laymen who have but a faint idea of what it really was. The name of the great American Chief Justice will always be associated with it, and for acute reasoning and logic, great learning, and grand judicial eloquence, it, like many others of the judgments of that great jurist, has never been excelled, if, indeed, it has ever been equalled. But every year it is appearing clearer that in this instance, he, and those judges who concurred with him, made a mistake. The courts of several States have refused to commit themselves to its doctrines, and it has required the power of the Supreme Federal tribunal, which has thus far adhered to the principle which the Dartmouth College Case decided, to enforce its rule. And in the court in which MARSHALL once presided, there is, to-day, a strong opposition to the principle which the Chief Justice had so great a share in declaring.

That principle is that the charter of a private corporation is a contract, the obligation of which the State may not impair. This, notwithstanding much dissent has been reiterated in so many decisions, (not a "current," but a "torrent" of authorities, as remarked by a Pennsylvania judge), that it can hardly now be questioned. And the Supreme Court of the United States has, in subsequent cases,

gone even farther in this direction, and has decided that not only those franchises which are granted for the accomplishment of the general purposes of the corporation are protected by the Constitution, but all the collateral stipulations which are inserted in the charter, but which are not necessary for the accomplishment of its general design, are equally protected. On this point see *Gordon v. The Appeal Tax Court*, and *Woodruff v. Trapnall*, *post*, p. 237.

*COLLATEREAL STIPULATIONS IN PRIVATE
CHARTERS.*

GORDON v. THE APPEAL TAX COURT.

[3 How. 133.]

In 1804, the Legislature of Maryland chartered several banks, among them the Union Bank, whose charter, under the act, was to run until 1816. In 1821, the Legislature passed an act continuing the banks' charters to 1845, upon condition that they would build a certain public road and pay a certain school tax — the statute declaring that if any of the banks accepted and complied with the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burden upon them. The Union Bank built its share of the road and paid its school tax. But the Maryland law-makers were not satisfied. Banks, they argued, were rich, and able to stand almost anything, and so in 1841 they passed a law taxing all bank stocks, and the assessor proceeded to collect this tax from the stockholders of the Union Bank. He had no success, however, for the Supreme Court decided that the statute of 1821 was a contract exempting the stockholders of the bank from any tax on their stock, which no subsequent act of the State could abrogate.

WOODRUFF v. TRAPNALL.

[10 How. 190.]

This is a story in six chapters.

CHAPTER I.

A State Legislature incorporates a bank. The State is the State of Arkansas, the bank is called the Bank of the State of Arkansas. One section of the act incorporating the bank provides: "The bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." All this is in the year of our Lord, 1836.

CHAPTER II.

The Honorable William Woodruff is Treasurer of the State of Arkansas. The Honorable Mr. Woodruff, to secure the faithful performance of the duties of his high office, executes to the State a bond with sureties.

CHAPTER III.

The Honorable Mr. Woodruff does not perform his duties as a State Treasurer should. He omits to turn over to the State \$3,000 which he has collected, and judgment is obtained against him for this amount and costs. The whole amount is \$3,755; the time is the year 1840.

CHAPTER IV.

Men may come and men may go, but legislators go on making laws forever. It is now A. D. 1845. The Legislature of Arkansas passes an act which

declares that hereafter nothing shall be received in payment by the State but par funds. The notes of the Bank of the State of Arkansas are not just now "par funds" by a good deal.

CHAPTER V.

One day in 1847, the Honorable Mr. Woodruff is interviewed by the sheriff on the subject of the judgment for \$3,755. He expresses a desire to pay it, and takes out his pocket-book. The sheriff discovering that the money is all in Arkansas State Bank bills quotes the act of 1845 and refuses to accept them.

CHAPTER VI.

The Honorable Mr. Woodruff appeals to the Supreme Court of the United States, and that tribunal says that the sheriff must take the Arkansas Bank bills in satisfaction of the judgment. Why? Because the undertaking of the State in the act of 1836 to receive the notes of the bank constituted a contract between the State and the holders of the notes, which the State could not break. But, of course, notes issued by the bank after the act of 1845 were not within the contract, and might be refused by the State.

There is considerable discussion now-a-days upon the way in which corporations are beginning to "run" this country, its legislators, and, in some few instances, its judges. The principle of the Dartmouth College Case is one great lever on which all monopolies are able to work; but even since then they have obtained further privileges in such judicial decisions as the two above. The Dartmouth College Case simply decided that the grant of a franchise by the State to a corporation by means of which the latter is enabled to pursue and accomplish the general objects of its creation is a contract giving rights which the people can never resume. But

the principle of the above two cases is that all the collateral stipulations which have been inserted in the charter are equally sacred.

I take the liberty of using Prof. Pomeroy's language, in his Handbook on Constitutional Law, as best explaining the meaning of this extension of the doctrine: "The collateral stipulations of this character which have been generally inserted in charters, may be grouped in two classes: those which limit the State's power of taxation, and those which limit the State's right of eminent domain. To illustrate: if a State should incorporate a bank with ordinary banking franchises, and should add in the charter that the rate of taxation imposed upon the institution should never exceed a certain specified amount; or, if a State should incorporate a toll-bridge company with the ordinary franchises necessary to enable the corporation to erect and maintain a bridge at a certain place, and to take tolls thereon, and should add a clause in the charter, declaring that no other bridge should be erected within certain distances up and down the stream; it is plain that neither of these stipulations would be necessary to the existence and the accomplishment of the objects of these respective corporations. The bank might carry on all legitimate banking business without any limitation upon the rate of taxation applicable to it; the bridge company might build and maintain their structure, and collect tolls from all who cross, although there were a dozen rival bridges. But it is plain that these and similar provisions in charters might be, and probably would be, very advantageous to the particular corporation. At the same time they would have the effect, if operative, to limit and restrain two important functions of the State government, — that of taxation, and that of eminent domain. Can a State Legislature thus bind itself and all future Legislatures; or, in other words, are these and similar clauses contracts between the State and the corporation, and thus within the protection of the United States Constitution?"

Gordon v. The Appeal Tax Court, Woodruff v. Trapnall and other cases since, answer these questions in the affirmative. From this doctrine there has been much dissent in the State courts, which have argued that the States are absolutely sovereign so far as they have not parted with that sovereignty to the general government; that they are absolutely sovereign over the subjects of taxation and eminent domain; being thus sovereign they cannot relinquish their sovereignty; one Legislature cannot bind a subsequent Legis-

lature on these subjects since the subsequent Legislature as much represents the sovereign people and holds all its sovereign powers as the former did. But these arguments have been unavailing in the Supreme Court of the United States.

*CONTRACTS NOT IMPLIED.***THE CHARLES RIVER BRIDGE v. THE
WARREN BRIDGE.**

[11 Pet. 420.]

The Charles River Bridge Company was incorporated by the Massachusetts Legislature and given power to erect and maintain a toll-bridge. Subsequently the Warren Bridge Company was chartered, and authorized to build a free bridge a very short distance from the first structure. This was, of course, destruction to the Charles River Bridge Company, whose right to collect tolls was what made the franchise valuable.

The Charles River Bridge Company tried to prevent the building of the Warren Bridge, claiming that with their franchise there was an implied contract that the Legislature would not interfere with it in this way. But the court said that as there was no express contract, nothing could be implied and the Warren Bridge might be built.

A half a loaf is better than no bread, and the people have something to be thankful for, after all. The Federal courts have not gone quite as far as corporations asked them to go. They had decided that charters of private corporations are contracts, and that all express collateral stipulations contained in such charters are also contracts. In *The Charles River Bridge Case*, they were asked to go farther, and to rule that the State might give rights to corporations by implication, even when it had not done so expressly. But the Supreme Court thought that the line must be drawn somewhere, and

that this was about the place to draw it, and they laid it down that the charter is to be construed most strongly against the grantee and that no rights which are not expressed in it can arise under it by mere implication.

Providence Bank *v.* Billings, *ante*, p. 162, was an earlier decision in which the same principle was established.

*MUNICIPAL CORPORATIONS.***EAST HARTFORD v. THE HARTFORD
BRIDGE CO.**

[10 How. 511.]

A town was given the right to maintain a ferry across a river. Afterwards, by several laws, the State first granted one-half of the ferry privilege to another town, and finally ordered it to be discontinued entirely. The town went to law, but got no redress, for the court held that a grant to a *municipal corporation* is not a contract, but is a law for the public good.

Municipal corporations are created as necessary conveniences in government, and hold their *powers and privileges* subject to legislative modification and recall at all times. "The doings of the Legislature as to this ferry," said Mr. Justice WOODBURY, in the above case, "must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the Legislature. They are incorporated for public and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and, therefore, to be considered as not violated by subsequent legislative changes."

But as regards its *property*, a municipal corporation is entitled to the same protection as a natural person. The City of Oshkosh had raised some money by taxation for the purpose of erecting a

high school building. Afterwards the Legislature passed a law ordering a portion of this money to be used for purchasing a site for a State normal school. The statute was declared void. "As to all matters pertaining to vested rights of property," said the court, "whether real or personal, and to the obligation of contracts, municipal corporations are as much within the protection of the Federal Constitution as private individuals are. The Legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation. *State v. Haben*, 22 Wis. 660.

*WHAT LAWS IMPAIR THE OBLIGATION OF
CONTRACTS — INSOLVENT LAWS.*

STURGES v. CROWNINSHIELD.

[4 Wheat. 122.]

Crowninshield was sued in Massachusetts on two promissory notes made by him in New York, on March 22, 1811, payable in August of the same year. He replied that he had been discharged on February 15, 1812, from all debts by a New York court, under an insolvent act of the State of New York. "When was that insolvent act passed?" asked the Supreme Court. "On the third day of April, 1811," answered Crowninshield. "Then the law impairs the obligation of a contract," said the court, "and it cannot help you. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar Crowninshield has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day, and that is the obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it."

Having seen the cases which decide as to what are "contracts" within the Constitutional provision, the foregoing case, and the fol-

lowing, are presented to answer the second question, viz.: What kinds of laws impair the obligation of contracts within the same section of the Constitution. "This question," says Mr. Pomeroy, "is one not easy to answer in its full extent. There may be some State statutes which plainly and unequivocally have the injurious effect, concerning which there is no room for argument. There may be others which as plainly and unequivocally do not have the injurious effect. Between these two extremes there are kinds and classes of laws concerning which there may be a doubt, there may be room for argument, for difference of opinion among legislators and judges. When we attempt, therefore, to lay down general principles which shall be absolutely inclusive and exclusive — including all laws which are obnoxious to the Constitutional provision, and excluding all others — we shall find ourselves involved in great difficulty." The courts have found this same difficulty, and the decisions on this question have, therefore, been somewhat conflicting — the States courts often taking one view of the subject, the Federal courts another and diverse view. The following general principles have, however, been pretty generally coincided in by all, viz.:

1. A contract may be impaired without being destroyed, and if this is so, it is as much within the Constitutional provision as though it was completely destroyed by the obnoxious law. The Constitution, as we have seen, says that no law shall be passed by the States which "impairs" the obligation of a contract.

2. The law to be void under this provision must operate upon a contract entered into before its passage. See *Ogden v. Saunders*, *post*, p. 251.

3. And if before the execution of the contract there was any law in force, giving the Legislature the right to modify it, or to repeal or modify a charter, etc., a subsequent repeal or modification will be good, for the power thus reserved enters into and becomes part of the contract at the time.

4. A judicial decision is a "law." The obligation of a contract cannot be impaired by a change in the judicial decisions of the State courts — the term "law" in the Constitution includes decisions of courts as well as statutes of Legislatures.

Laws impairing the obligation of contracts may be divided into two classes: (I.) those which apply to the terms of contracts, (II.) those which apply only to the remedy upon them.

I. *As to laws which apply to the terms of contracts*, there is not much confusion in the decisions. The cases of this character are well summed up by Mr. Pomeroy in these words: "In respect to private contracts between individuals, it is so plain as to require the citation of no authority to support the proposition that all State laws operating upon past agreements, and affecting the very terms thereof, which wholly or partially discharge one contracting party, without the consent of the other, from doing the very thing which he agreed to do, or which add new stipulations or conditions to the agreement, or which take away any which were incorporated into it, or which extend or shorten the agreed time for performance, or which render contracts illegal or void, which were before legal and valid, or which make those legal and binding, which were before illegal and null, all such legislative acts would impair the obligation of existing contracts affected thereby. * * * In respect to contracts between a State and private persons, including grants and charters, it is equally plain that where no power for such purpose is antecedently reserved, all statutes directly repealing the grant or charter, or in any way modifying its express terms, by changing the organization of a corporation, or by taking away powers or by adding new conditions or duties, impair the obligation of this species of contracts." Pomeroy Const. L. 600, 601.

State insolvent laws are an illustration of laws of this character. Such laws provide for the discharge, under certain conditions, of the debtor from his debts. Therefore, as decided in the great case of *Sturges v. Crowninshield*, they are void as to debts created before their passage, for in releasing the debtor from what he agreed to do, they impair, or rather destroy the obligation of the contract. But as to debts created subsequent to their passage, they are valid. On this point see *Ogden v. Saunders*, *post*, p 251.

II. *As to laws which apply only to the remedy*, there is more difficulty and it is here where the decisions of the courts are not always reconcilable. Laws of this kind fall under the following heads:

1. *Laws taking away remedies*. A law which deprives a party of all legal remedies upon an existing contract is void. But it seems if a person has two remedies, and a subsequent statute takes away only one of them it is not void, for he has still the other remedy left.

2. *Statutes of limitation*. A statute of limitation is one which prescribes that a person having a right of action shall commence it within a certain time, and if he fails to sue within that time the

doors of the courts are closed to him. The courts have laid it down that not all statutes of limitation are obnoxious to the constitutional provision. If their effect is to prevent a party from bringing an action — as by leaving him too short a time, — then they are void, but if they leave him a reasonable time in which to come into court, although that time is shorter than had before existed, they are valid. For an illustration of this distinction, see *Terry v. Anderson*, *post*, p. 254.

3. *Laws abolishing imprisonment for debt.* These, it is held, are not void, they do not at all impair the obligation of contracts. See *Mason v. Haile*, *post*, p. 256.

4. *Stay and appraisement laws.* A stay law is one which provides that execution or other process shall not issue for some definite period of time after the recovery of a judgment. An appraisement law is one which requires the property of a judgment creditor seized on execution to be appraised, and forbids its sale for a price less than a certain portion of its appraised value. These laws are held in the Federal courts to be unconstitutional so far as they apply to contracts entered into before their passage. See *Bronson v. Kinzie*, *post*, p. 257. But the State courts take a different view of the question. Thus, during the civil war, the Legislatures of Pennsylvania and Iowa, passed statutes staying all civil process against persons in the military service of the State or the United States, for the term of such service and a short period thereafter. The validity of these statutes was contested, but the Supreme Courts of both States decided that they were unobjectionable. *Breitenbach v. Bush*, 44 Pa. St. 313; *McCormick v. Rusch*, 15 Iowa, 127.

5. *Laws exempting property from execution.* An exemption law is one which relieves all or a portion of a debtor's property from liability to be seized and sold under execution. A., for example makes a promissory note to B., which he fails to pay, and B. gets judgment against him. While the suit is pending the Legislature passes a law which exempts from execution A.'s tools, his house, his household furniture, and his homestead. Does such a law effect B.'s claim. The courts say yes to this question when the amount of the exemption is reasonable. See *Edwards v. Keazry*, *post*, p. 260.

Sturges v. Crowninshield is also a leading case on another point. The Constitution provides that Congress "shall have power to establish uniform laws on the subject of bankruptcies throughout

the United States." The question arises can the State pass bankrupt or insolvent laws also? The answer is that the power is given to Congress; but that body may or may not exercise this power. When it abstains from doing so the States may legislate on the subject; but when Congress passes a bankrupt law the State laws must give way to the National law. Should Congress, however, abolish its bankrupt laws, then the State law comes in force again, to become nugatory, however, whenever Congress again sees fit to exercise its power on the subject.

LAWS IN FORCE AT THE TIME OF CONTRACT—DOMICIL OF CREDITOR.

OGDEN v. SAUNDERS.

[12 Wheat. 358.]

Ogden, who lived in New York, in September, 1806, accepted certain bills of exchange held by Saunders, a resident of Kentucky. Subsequently he obtained a discharge under the New York insolvent law of 1801. But afterwards removing to Louisiana, he was sued upon these bills, and set up the New York discharge.

The court decided that the New York law *being in existence when the bills were accepted* by Ogden, did not impair the obligation of a contract, and the discharge was valid. The insolvent act being part of the law when the contract was made, became part of the agreement.

But on another ground Ogden was not so successful. The court held further, that the State statute could not affect the rights of creditors who were citizens of other States, and therefore could not bind Saunders.

BALDWIN v. HALE.

[1 Wall. 223.]

\$2,000.

BOSTON, February 21, 1854.

Six months after date, I promise to pay to the order of myself, two thousand dollars, *payable in Boston*, value received.

J. W. BALDWIN.

Mr. Hale, of Vermont, as indorsee for value of the above note, brought suit on it one day in the United

States Circuit Court for the District of Massachusetts. Mr. Baldwin pleaded a discharge from all his debts in insolvency, which he had already obtained in a Massachusetts court.

Mr. Hale referred the court to *Ogden v. Saunders*, but Mr. Baldwin said that the courts of Massachusetts had always held that if the contract in express terms was to be performed in the State where the debtor resided, and where he obtained his discharge, the creditor, though an inhabitant of another State, is bound by it. But the Supreme Court of the United States said that the Massachusetts courts were wrong, and Mr. Baldwin's discharge was no defence to Mr. Hale's suit.

The second question decided in *Ogden v. Saunders*, and the one also decided in *Baldwin v. Hale* was the following: Does the discharge of a debtor by the insolvent law of one State affect the claim of creditors in other States? Three classes of cases, it will be readily seen, may arise where this question will have to be answered, viz.: (1.) Where the creditor and debtor are inhabitants of the same State. (2.) Where the creditor and debtor are inhabitants of different States. (3.) Where the creditor and debtor are inhabitants of different States, but the contract is, by its terms, to be performed in the State where the debtor lives. The case above decided that the creditor is bound in case 1, but is *not* bound in cases 2 and 3.

1. A. and B. are citizens of New York. The New York courts grant A. a discharge from his debts. This discharge destroys B.'s claim on A.

2. A. is an inhabitant of New York, C. of Kentucky. The New York discharge will not affect C.'s claim. See *Ogden v. Saunders*, *ante*, 251.

3. A., a citizen of Massachusetts, executes a note payable in Boston, which comes into the hands of D., who resides in Vermont. The discharge of A. from his debts by a Massachusetts

court, does not affect D.'s claim. The courts of Massachusetts for some time maintained that D's claim was affected in such cases, but *Baldwin v. Hale*, overturned these decisions.

*STATUTES OF LIMITATION.***TERRY v. ANDERSON.**

[5 Otto, 628.]

By the law of Georgia up to the year 1869, a suit to enforce the liability of the stockholders of a bank for its debts was not barred until the expiration of twenty years from the time the action accrued. But in 1869 the Legislature declared that all actions of this character, among others, which had accrued prior to the 1st of June, 1865, should be brought by the 1st of January, 1870, or the right to sue would be forever barred. Mr. Terry, in 1874, brought an action against the assignees of the Planters' Bank, of Georgia, and was met by this statute. He did not deny that the statute, if valid, barred his claim, but he argued that it was unconstitutional as impairing the obligation of a contract. He argued, unfortunately for himself, on the wrong side.

“The court,” said Chief Justice WAITE, “has often decided that Statutes of Limitation are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * * It is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which

has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced, and as to the forms of actions or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain. In all cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the Legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed."

And as the statute in this case gave over nine months on which to sue upon a cause of action which had already been running over four years, the court thought there was nothing unreasonable in the new law, and Mr. Terry lost his case.

Statutes of Limitation, it is said in a more recent case, are statutes of repose. "They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts which was part of their obligation, we should pronounce the statute void." *Edwards v. Kearzy, post*, p. 260.

*ABOLISHING IMPRISONMENT FOR DEBT.***MASON v. HAILE.**

[12 Wheat. 370.]

Among the rights which a creditor formerly had of forcing his debtor to pay up was that of throwing him into jail. Imprisonment for debt is now pretty generally abolished in this country, but in 1814 it had not been. Therefore it was, that Mr. Mason, of Rhode Island, who had an obdurate debtor by the name of Haile in durance vile, was not at all satisfied when the Legislature stepped in and ordered that a discharge in insolvency from all debts should also discharge a party “from all imprisonment, arrest, and restraint of his person therefor.”

Mr. Mason, of course, claimed that this law impaired the obligation of a contract. But the Supreme Court did not think so. Such a law acts merely upon the remedy, and that in part only. It does not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.

*APPRAISEMENT LAWS.***BRONSON v. KINZIE.**

[1 How. 311.]

In 1838, the holder of a mortgage on land in Illinois was entitled by the law of the State to foreclose the same immediately upon a breach of the condition, and to have the land sold absolutely, and in that year Kinzie executed a mortgage of his land to Bronson. Three years later the Legislature of Illinois passed a statute providing that in sales under a decree foreclosing a mortgage, the debtor should have the right to redeem the land within one year after the sale by paying the purchase-money and ten per cent interest, and that no sale should be made until the lands were first appraised, and unless they were sold for at least two-thirds of their appraised value. Shortly after this statute was passed Kinzie failed to pay interest as agreed, and Bronson applied to have the lands sold absolutely for what they would bring. But Kinzie objected, and said that the sale should be made subject to the right of redemption, and should not be made at all if the land did not bring two-thirds its appraised value.

The court was appealed to, and it decreed in favor of Bronson. The statute of 1841, it held, was void so far as it applied to this mortgage.

“If the law of the State passed afterwards,” said Chief Justice TANEY, “had done nothing more than

change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure, the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the Statute of Limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments * * *

And although the new remedy may be less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. * * *

It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alteration of the remedy and provisions, which in the form of remedy, impair the right. But it is manifest that the obligation of a contract, and the rights of a party under it, may in effect be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions so as to make the remedy hardly worth pursuing. * * *

If such rights (as given by the statute of 1831) may be added to the original contract by subsequent legislation, it would be difficult to

say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred by others, and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for any thing like its value. This law gives to the mortgagor and to the judgment-creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract, and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations and is prohibited by the Constitution."

EXEMPTION LAWS.

EDWARDS v. KEARZY.

[6 Otto. 595.]

Certain debts were incurred in North Carolina prior to the year 1868. In that year a new Constitution was adopted by which the personal property of any resident of the State to the value of \$500 was exempted from sale under execution; also a homestead and the dwelling and building thereon, not exceeding in value \$1,000.

The creditor tried to take these things from the debtor to liquidate his demands, but the latter claimed them as exempt under the Constitution. The creditor maintained that the new law, being passed after his demands were incurred, impaired the obligation of the contract, and was unconstitutional. And so thought the Supreme Court of the United States.

The exemption law in this case was held void by the majority of the court on the ground that "in regard to the mass of contracts, and the situation and circumstances of debtors as they are ordinarily found to exist, it would seriously affect the efficiency of remedies for the collection of debts." Doing so it impaired the obligation of the contract and was void. Notwithstanding the result in this case, it does not follow that a law exempting necessary wearing apparel, or implements of agriculture, or the tools of mechanics, or articles or utensils of a household nature, recognized as

articles and utensils of necessity, would be void. But, like Statutes of Limitation, to be valid they must be reasonable. The North Carolina exemption was more than was necessary and reasonable and was therefore void.

*EMINENT DOMAIN.***WEST RIVER BRIDGE COMPANY v. DIX.**

[6 How. 507.]

The West River Bridge Company had a charter from the State of Vermont granting them the exclusive privilege of erecting and maintaining a bridge over a river. A subsequent act of the Legislature provided for the condemning of property for highways, and under this statute, the authorities took the company's bridge (after assessing compensation for it) and turned it into a free public highway.

The company argued that this proceeding impaired the obligation of a contract, and asked to have the thing set aside. But while the court agreed with them that the charter was a contract, it held that the charter was subject to the right of eminent domain in the State, and that the company had no legal complaint.

What is known as the power of eminent domain is the authority which the State has to control and appropriate private property for the public benefit, whenever the public safety, convenience or welfare may require. It is a public necessity that there should be a street made through my lot. I cannot refuse to part with the portion of my land required for that purpose. The Constitutions of the United States, and of the States, provide, however, that private property shall not be taken without "just compensation," and, therefore, I am entitled to be paid the value of my property, and the State cannot take it away without paying me.

West River Bridge Company v. Dix is an important case, showing that a franchise, like any other kind of property, may be taken away in part or in whole by means of this power in the State.

CHAPTER VI. — THE POLICE POWER.

PROTECTION OF PUBLIC HEALTH.

THE SLAUGHTER-HOUSE CASES.

[16 Wall. 36.]

The Legislature of Louisiana in 1869 granted to a corporation the exclusive right for twenty-five years to maintain slaughter-houses and cattle-yards within a certain district, and prohibited all other persons from building or keeping such houses or yards within these limits. It is also required that all cattle or other animals intended for sale or slaughter within the district should be brought to the yards and houses of the corporation, and authorized the corporation to charge certain fees for the use of its property in this way.

The butchers of New Orleans, which city was within the district, objected to this grant; they said it was a monopoly, and for this reason illegal. But the court construed it as a "police" regulation, designed for the health and comfort of the people, and the butchers got no relief.

The police power of a State has been defined as "the authority to establish for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so

far as is reasonably consistent with a corresponding enjoyment by others." Cooley Prin. Const. L. 227. "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State." *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 149.

Laws prohibiting work and labor or the pursuit of occupations on Sunday are another instance of police regulations. Although they may be an encroachment on the religious liberty of a citizen, or a restraint upon trade and commerce, they are sufficiently justified, and are a valid exercise of the police power of the State. So are laws governing the use of highways, such as regulating the speed of travel thereon, their improvement, etc. A like subject is the regulation of navigable waters.

*POLICE POWER RESIDES IN THE STATES.
POWERS OF CONGRESS.*

UNITED STATES v. DEWITT.

[9 Wall. 41.]

The Internal Revenue Act, passed by Congress in 1867, declared that no person should, under penalty of fine and imprisonment, mix naphtha and illuminating oil for the purpose of selling them, or offer this compound for sale. It also prohibited anyone from offering for sale oil made of petroleum for illuminating purposes, inflammable at less temperature than 100° Fahrenheit. Dewitt, who lived in Detroit, Michigan, did just what the statute said that people should not do, and being fined for his temerity, appealed to the Supreme Court, urging that Congress had no power to pass such a law.

The court said he was right. "As a police regulation," they said, "relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress, excludes, territorily, all State legislation, as for example, in the District of Columbia."

The Constitution does not take away the police power from the States; it is left with them. The National government cannot assume any supervision of the police regulations of the States. But the Supreme Court of the United States is frequently called on to examine State statutes when they are passed ostensibly under

the police power, and to consider whether they do not interfere with some of the powers given exclusively to the National government. See *Railroad Co. v. Husen*, and *Chy Lung v. Freeman*, *post*, pp. 268, 269.

MUST NOT CONFLICT WITH NATIONAL RIGHTS.

RAILROAD CO. v. HUSEN.

[5 Otto, 465.]

In violation of a statute of Missouri which prohibited any one from bringing any Texas, Mexican or Indian cattle into the State between March 1st and November 1st in each year, the Hannibal and St. Joseph Railroad carried some of these cattle into Missouri. Now, these cattle had a disease called the Spanish fever, which they communicated to Mr. Husen's cattle, to his great loss, and Mr. Husen brought an action against the railroad company to recover his damages.

The railroad company argued that the statute was void, as being a "regulation of commerce," and thus, as we have seen,¹ beyond the power of a State to pass. Mr. Husen's counsel on the other hand insisted that it was a police regulation. The railroad company won.

"We admit," said the Supreme Court, "that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic

¹ *Ante*, p. 215.

order, morals, health and safety. * * * It may also be admitted that the police powers of a State justify the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State, for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive."

But, notwithstanding this, the court said that the police power of the State cannot be exercised over a subject confided exclusively to Congress by the Federal government, *beyond the absolute necessity for its exercise*. Tested by this rule the Missouri statute was a plain intrusion upon the exclusive domain of Congress.

CHY LUNG v. FREEMAN.

[2 Otto, 275.]

A California statute required the master of every vessel arriving in the State from a foreign port to give a bond for every passenger who was a lunatic, idiot, deaf, dumb, blind, infirm, a public charge, or likely to

become one soon, or a lewd or debauched woman. Chy Lung was a Chinese woman, and a passenger on the steamship Japan, from China. When the ship landed at San Francisco the California officials decided that Chy Lung was a lewd woman, and refused to let her land until the captain had executed a bond under the statute, or paid a sum of money in commutation thereof which the statute permitted. The captain refused to do either. Chy Lung would have had to go back to China had a United States judge not issued a *habeas corpus*. The case went to the Supreme Court of the United States, where the statute was declared void, and Chy Lung was allowed to remain in the "land of the free."

The ground of the decision was, that even if it is within the police power of a State, to pass statutes in regard to the criminal, the pauper and the diseased emigrant landing within its borders, this power is limited to such laws as are absolutely necessary for that purpose. The statute of California extended far beyond the necessity, and invaded the right of Congress to regulate commerce with foreign countries.

The question in these cases was whether what was called by the States a police regulation, and therefore within their power to pass, was really of this character, or whether it was a "regulation of commerce" in disguise. And the Supreme Court of the United States took the latter view of it, mainly for the reason that it was an exercise of that power beyond what was necessary, and interfered with the National authority over interstate and foreign commerce more than there was any need for.

As to the Missouri statute the court said: "It is not a quarantine law, it is not an inspection law. It says to all natural persons and to all transportation companies: 'You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1 and November 1 in any year, no matter whether they are free from disease or not; no matter whether they may do an in-

jury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State, without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact."

ADMISSION TO THE BAR.

BRADWELL v. STATE.

[16 Wall. 130.]

There are not many female lawyers in the United States, but the few manage to make a good deal of noise. It is, therefore, not surprising to find one of them bringing a sovereign State to book in the Supreme Court of Illinois, for refusing to admit her to practice in its courts. She relied upon the Fourteenth Amendment to the Constitution, that no State shall "abridge the privileges or immunities of citizens of the United States." But it was no use. The right to practice law in the State courts was not such a privilege, said the court.

The plaintiff made another point in this case. She quoted section 2 of article IV. of the Constitution, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and said that being born in Vermont, and being refused admission to the bar in Illinois, she was within the protection of this section. But it was discovered that she had lived a good many years and was then living in Chicago, and was, therefore, a citizen of the *same* State whose laws she was complaining about. So this section did not help her either.

Subsequently to this case, the legislators of Illinois melted and passed a law permitting women to be admitted to the bar. The

plaintiff was then made happy, and, in the words of her counsel is now able to manage those "many causes, in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve."

*CORPORATIONS.***PAUL v. VIRGINIA.**

[8 Wall. 168.]

Mr. Samuel Paul, whom we remember¹ as arguing before the Supreme Court of the United States that the Virginia statute, requiring a license from every foreign insurance company doing business in Virginia, was a "regulation of commerce," and therefore void, and whom we also remember received the answer that issuing a policy of insurance was not "commerce" at all, — Mr. Samuel Paul made before that tribunal another argument for the purpose of having the statute declared unconstitutional. He submitted that the statute conflicted with that clause of the United States Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" because here was a New York insurance company which could not do business in Virginia like a Virginia company, but had to get a license, deposit bonds, etc.

But the court decided against Mr. Paul on two grounds. It ruled, first, that corporations are not "citizens" within the clause; second, that the "privileges and immunities" mentioned above, are those privileges and immunities which are common to the citizens in the

¹ *Ante*, p. 219.

latter States, under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured by this provision in other States.

INTOXICATING LIQUORS.

BARTEMEYER v. IOWA.

[18 Wall. 131.]

Bartemeyer was fined in Iowa for selling a glass of whiskey in violation of a law of the State prohibiting the sale of intoxicating liquors. Bartemeyer appealed to the Supreme Court, alleging that he was a citizen of the United States, and that the Iowa law abridged his "privileges and immunities." But the court held that the law was valid. Regulating and totally prohibiting the liquor traffic fell within the police regulation of a State; and the right to sell intoxicating liquors was not one of the "privileges or immunities," which by the Fourteenth Amendment the States are forbidden to abridge.

BEER COMPANY v. MASSACHUSETTS.

[7 Otto, 25.]

The Boston Beer Company was incorporated in 1828, for the purpose of manufacturing malt liquors in all their varieties, a statute being then in force in the State giving the Legislature power to alter or repeal

charters. Under a prohibitory liquor law, passed in 1869, certain malt liquors belonging to the company were seized and forfeited. The Beer Company claimed under its charter a right by contract to manufacture and sell liquor forever without interference. But the court decided otherwise. "The police power," said Mr. Justice BRADLEY, "extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these subjects."

It seems to be pretty well settled that the regulation or absolute prohibition of the manufacture and sale of intoxicating liquors is fully within the police power of the States. It seems, however, that there is a limitation, viz.: where the law interferes with some vested rights of property. This, however, has not yet been expressly passed upon by the highest judicial authority, though there are *dicta* to that effect in both of the above cases. "No one," said one of the judges in *Bartemeyer v. Iowa*, "has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society provided it does not interfere with vested rights of property. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of a citizen."

Another constitutional question of an important character was raised in the Slaughter House Cases. It was argued that the grant to the Slaughter House Company violated the Thirteenth Amendment to the Constitution by creating an "involuntary servitude," and that it also violated the Fourteenth Amendment, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." But the court held that the Thirteenth Amendment had nothing to do with the case, because the "involuntary servitude" prohibited by it referred only to some species of personal slavery, such as African slavery, which it had been

passed primarily to prevent for all time. As to the other objection the court held that it was absurd to say that the grant in question, deprived anybody of their life, liberty, or property; that the "privileges or immunities" of citizens of the United States do not include the right to hold property, engage in business, etc., and that the inhibition against the States "denying to any person the equal protection of the law" was aimed (as the history of the time shows) exclusively at State statutes which were one-sided and oppressive in their effect upon the emancipated blacks. Four judges, however, did not agree with this latter conclusion.

In later cases, it has been held that the right to practice law in State courts (*Bradwell v. Illinois*, *ante* p. 272); the right to sell intoxicating liquors (*Bartemeyer v. Iowa*, *Beer Co. v. Massachusetts*, p. 275, are not "privileges and immunities of citizens of the United States" within the Fourteenth Amendment.

*REGULATION OF RAILROADS.***RAILROAD COMPANY v. FULLER.**

[17 Wall. 560.]

A statute of Iowa provided as follows, viz. : —

1. That each railroad company in the State should annually, in September, fix its rates for the transportation of passengers and freights.

2. That it should, on the first day of the next month, post a printed copy of its rates at its stations and depots, and keep it there during the whole year.

A failure to comply with this act, or the charging of a higher rate than was posted, subjected the offending company to the payment of a penalty.

The Chicago and Northwestern Railroad Company posted up their rates as required, but one day charged a man named Fuller more than their schedule tariff, for which they were fined in an Iowa court.

The railroad company appealed to the Supreme Court of the United States, and they tried hard to convince that tribunal that the Iowa statute (the railroad running through several States) “was a regulation of commerce, and invalid.” But the court considered it a regulation of police, and valid.

“The statute,” said Mr. Justice SWAYNE, “only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is pro-

moted without wrong or injury to the company. The statute was, doubtless, deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice. It is not, in the sense of the Constitution, a regulation of commerce. It is a police regulation, and, as such, forms a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves."

It is under the police power of the States that the railroads of the country are regulated. Thus, under this power, railroads may be compelled to fence their tracks; to check their speed at exposed places; to carry impartially for all persons; to permit other roads to cross their track, and to share the expense of the crossing; to ring a bell or sound a whistle at crossings, or to station a flagman at such places; to exhibit their rates of fare (as in the principal case), and the like.

REGULATION OF CHARGES.

**PEIK v. CHICAGO AND NORTHWESTERN
RAILWAY COMPANY.**

[4 Otto, 164.]

By its charter, the Chicago and Northwestern Railroad Company was authorized to "demand and receive such sums of money for the transportation of persons and property, and for storage of property as it shall deem reasonable." This charter was granted by the State of Wisconsin, whose Constitution at that time provided that acts for the creation of corporations might be at any time altered or repealed by the Legislature. In 1874 the Grangers took a hand in legislation, and passed laws regulating the charges of railroad companies in the State. The Chicago and North Western Railroad Company tried to have these statutes declared void as to them, but without success. "Where property has been clothed with a public interest," said the Chief Justice, "the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change."

**CHICAGO, BURLINGTON AND QUINCY RAIL-
WAY COMPANY v. IOWA.**

[4 Otto, 155.]

In 1876 the Granger movement in several of the States culminated in the passage of laws regulating the rates which railroad companies should charge for the transportation of persons and property. Among others the Iowa Legislature passed a law fixing the maximum rate of charges for the transportation of freight and passengers in the different railroads in the State. The Chicago, Burlington and Quincy Railroad, as lessee of several other roads in the State, was especially displeased with the law, and tried to enjoin the State officers from enforcing it, for the following reasons:—

First, the railroad said that the Legislature had no right to say what it should charge for its services. But the court answered: “Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment, affecting the public interest, and subject to legislative control as to their rates of fare and freight unless protected by their charters.”

Beaten from this position the railroad said that if the State had the power it had never used it before, and from this tried to imply that the State had relinquished it. But the court answered again: “It is a matter of no importance that the power of regulation now under consideration was not exercised for more

than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people."

Driven now quite into a corner, the railroad pleaded that before this law was passed, it had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. But again the court shook its head and answered: "The company could not grant or pledge more than it had to give. After the pledge, and after the lease, the property remained within the jurisdiction of the State, and continued subject to the same governmental power that existed before."

The railroad having no more arguments to offer gave up the fight.

MUNN v. ILLINOIS.

[4 Otto, 113.]

The grain elevators of Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at once, according to their size. But they are in the hands of a few great capitalists, and the Legislature of Illinois, coming to the conclusion that their charges were excessive and unfair, undertook to limit them and to prescribe by law the maximum which they should

be able to collect from their customers. The elevator men did not like this law at all, and made a great effort to have it declared unconstitutional, first by the Supreme Court of the State of Illinois, and next by the Supreme Court of the United States. But in neither tribunal did they succeed; the law was sustained.

As a general thing a man has a right to sell his goods at his own prices, and cannot be compelled to part with them against his will. But there are several exceptions to this rule, and one of these is the case of common carriers. *Munn v. Illinois* is an important case, making, as it does, the test the fact that the employment regulated is a public one, and holding, as it does, that the business of conducting elevators for grain is a "public" employment within the rule.

CHAPTER VII.—MISCELLANEOUS CASES.

“DUE PROCESS OF LAW”—“LAW OF THE LAND.”

MURRAY'S LESSEE v. HOBOKEN LAND CO.

[18 How. 272.]

Samuel Swartwout, of New Jersey, a public officer of the United States, was found one day to be a debtor to the government. By virtue of a statute of Congress, authorizing the lands of debtors to the government to be seized and sold on a distress warrant issued by the Secretary of the Treasury, Samuel's lands were taken possession of in this summary manner, sold, and the proceeds turned into the Treasury. Samuel took no heed of this proceeding, but sold the same land to the defendant. The plaintiff, who was the purchaser at the government sale, now brought suit against the defendant for the land. The latter claimed that, as the amount due from Samuel to the government had never been ascertained by any trial, and as the warrant under which the land was sold had not been issued from any court, the sale was void, as there had been no “due process of law,” as required by the Constitution.

But the court thought otherwise. "Though due process of law," said Mr. Justice CURTIS, "generally implies and includes, *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process in its nature final issues against the body, lands and goods of certain public officers without any such trial."

That provision in the Constitution which says that no one shall be deprived of "life, liberty or property without due process of law," was introduced to guard against a repetition of such practices as obtained in France before the Revolution, where a letter from the king sent a man to the Bastille for good. Our ancestors demanded this protection, and first got it in Magna Charta, which provides "that no freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or anyways destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers and the law of the land." The phrases "law of the land" and "due process of law" are identical, and refer to the common or statute law of the land, so far as the Legislature keeps within the principles of right and justice. As Magna Charta was obtained to restrain the arbitrary exercise of kingly powers, so this provision of the Constitution restrains the arbitrary actions of Legislatures. Daniel Webster, the great expounder, has said of this provision: "Everything which may pass under the form of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. * * * The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

"By the law of the land, is most clearly intended the general law—a law which hears before it condemns, which proceeds upon

inquiry, and renders judgment only after trial." But, as laid down in Murray's Case, *supra*, the same forms are not always necessary; in some cases the government may interfere directly and without a trial. So, under this provision, a person is not entitled to a jury trial, but his case may be tried by a judge, or military offenders may be tried by military tribunals, provided everything conforms to the established principles of right and justice.

“*EX POST FACTO*” LAWS.

CALDER v. BULL.

[3 Dall. 386.]

In the year 1793 a Probate Court in Connecticut rendered a decree refusing to admit a certain will to probate, and the parties presenting it, having failed to appeal within the time prescribed by statute, there was nothing further that the court could do for them in the matter. At this juncture, the Legislature, at their request, passed a law setting aside the decree of the Probate Court, and ordering a new hearing. The court heard the case again, and this time made a decree establishing the will. The other side now appealed to the Supreme Court of the United States, claiming that the act of the Legislature was an *ex post facto* law and, therefore, void. But the Supreme Court did not agree with them. “In my opinion,” said Mr. Justice CHASE, “the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law. The former only are prohibited. * * * The plain and obvious meaning and intention of the prohibition

is this: that the Legislature shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light is an additional bulwark in favor of the personal security of the subject to protect his person from punishment by legislative acts bearing a retroactive operation. I do not think it was intended to secure the citizen in his private rights of either property or contract. I will state what laws I consider *ex post facto* within the words and intent of the prohibition: —

“1. Every law that makes an action done before the passage of the law, and which was innocent when done, criminal, and punishes such action.

“2. Every law that aggravates a crime, or makes it greater than it was when committed.

“3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

“4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender.”

And as the Connecticut statute did not fall within any of the above four divisions, the court held that it was valid.

The Constitution prohibits both the States and the United States from passing *ex post facto* laws. All retrospective laws would seem to be embraced in the term *ex post facto* laws, but *Calder v. Bull* determined that in the United States Constitution these words are limited to laws of a criminal nature. Laws of this kind

according to Mr. Justice Chase may be classed under four heads:—

1. *A law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.*—At common law adultery was not a criminal offence. A. commits adultery in December, 1850. In January, 1851, the Legislature passes a law making adultery punishable with fine and imprisonment, whether committed before or after its passage. The statute would be void as to A.'s act, because *ex post facto*.

2. *A law aggravating a crime or making it greater than it was when committed.*—In 1880, gambling in the State of Missouri was a misdemeanor. A State law passed in 1881, and declaring those convicted of gambling in 1880 to be felons, would be *ex post facto* and void.

3. *A law changing the punishment and inflicting a greater punishment than the law annexed to the crime when committed.*—A negro was tried in Alabama in 1866 for burglary. After the crime was committed, the punishment for burglary was changed from imprisonment for *three* years to imprisonment for *five* years, or death, in the discretion of the jury. It was held that the negro could only be punished under the old law. *Miles v. State*, 40 Ala. 39. But a law which ameliorates the offence by making the punishment less is not within the rule; and a subsequent increase of punishment for a second offence is not *ex post facto*. *Rand v. Commonwealth*, 9 Gratt. 738.

4. *A law which alters the legal rules of evidence and receives less or different testimony than was required at the time of the commission of the offence, in order to convict the offender.*—The law of Alabama was that a conviction could not be had on the testimony of an accomplice. Subsequently a statute was passed enacting that this law should not extend to misdemeanors. But it was held that this could not apply to misdemeanors committed before its passage. *Hart v. State*, 40 Ala. 32. But the following kinds of laws have been held not within this provision, viz.: A law which changes the practice in criminal cases, but preserves to the prisoner his substantial rights (*State v. Manning*, 14 Tex. 402; *State v. Corson*, 59 Me. 137); or which takes away from him the privilege of mere technical objections (*Com. v. Hall*, 97 Mass. 570); or which limits the number of peremptory challenges to jurors (*Dowling v. State*, 5 S. & M. 664); or modifies the ground of challenge for cause (*Stokes v. People*, 53

N. Y. 164); or permits a change of venue for the purposes of a fair trial. *Gut v. State*, 9 Wall. 35.

The Supreme Court have lately extended the rules in *Calder v. Bull*, and have announced the doctrine that *any law passed after the commission of an offence which alters the position of a party to his disadvantage*, is an *ex post facto* law, and void as to him. *Kring v. State*, 16 Cent. L. J. 308.

“ *TWICE IN JEOPARDY.* ”

UNITED STATES v. PEREZ.

[9 Wheat. 579.]

Joseph Perez was tried in New York for a capital offence ; but, the jury being unable to agree, were discharged by the court. Joseph Perez afterwards claimed his discharge, arguing that he could not be tried again as he had been already once in jeopardy for the crime charged.

But the court did not think so. “ We are of opinion,” said Judge STORY, “ that the facts constitute no legal bar to a future trial. The prisoner has not been convicted *or acquitted*, and may again be put on his defence.”

Art. V. of the amendments to the Constitution of the United States says that no person shall “ be subject for the same offence to be twice put in jeopardy of life or limb.” The meaning of this is that one trial and one verdict protect a person against a subsequent accusation for the same offence, whether the verdict be for or against him, or whether the courts are satisfied with the verdict rendered or not. Therefore, when a person charged with a crime is put on trial before a court of competent jurisdiction, and a jury has been empaneled, he is “ in jeopardy,” and cannot again be tried for the same crime, whatever may be the result of the first trial.

There are, however, as usual, some important exceptions to this rule, viz. :

1. Where the prisoner is convicted, but on his own appeal the judgment is set aside either by the court that tried him, or an appellate court.

2. Where the court which tried him has no jurisdiction of the case.

3. Where the indictment was defective.

4. Where the jury is discharged through necessity, as when a juror takes sick, or dies, or the jury cannot agree, as in Perez's case.

In all these cases the prisoner may be put on a second trial, for he has not been in legal "jeopardy" within that term as used in the Constitution.

“CRUEL AND UNUSUAL PUNISHMENTS.”

WILKERSON v. UTAH.

[9 Otto, 130.]

Wilkerson was tried in the country of the Mormons and convicted of the murder of William Baxter, in July, 1877. According to the law of Utah a person convicted of any crime, the punishment of which is death, may be shot, hanged or beheaded, as the court may direct or as the criminal may choose. Wilkerson not making the grim election which the law allowed, the judge sentenced him to be shot, and the point was made in the Supreme Court that to put a man to death by shooting was a “cruel and unusual punishment” within the meaning of those words in the Constitution.

But the court was not of this opinion. “Difficulty,” said Mr. Justice CLIFFORD, “would attend the effort to define with exactness the extent of the constitutional provision, which provides that ‘cruel and unusual punishments’ shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by Blackstone, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”

The cases mentioned by Blackstone, are where the prisoner convicted of treason was drawn on hurdles to the place of execution, and then disembowelled, his entrails burned before his eyes, and after being hanged and cut down alive a few times he was

beheaded and quartered, and his limbs sent around the country to adorn the walls of the larger cities. This is a way our ancestors had of making crime odious.

The modern theory of punishment is that it should only be inflicted for two purposes, viz.: to reform the criminal, and to protect society. Capital punishment is permitted for this end, and therefore torture is not permitted.

A recent case in California touched upon the construction of the constitutional provision prohibiting "cruel and unusual punishments." Among the many methods which the people of California tried to make John Chinaman's lot not a happy one was the passage of an ordinance of San Francisco, that every male person committed to the county jail should immediately upon his arrival there have the hair of his head clipped short. This was, of course, directed against John's queue, for to lose this appendage is considered among Chinamen as a disgrace, and as entailing terrible punishment after death. But the United States Court decided that as applied to John this was a "cruel and unusual punishment," and, therefore, not constitutional. *Ho Ah Kow v. Nunan*, 18 Am. L. Reg. 676.

TABLE OF ABBREVIATIONS IN THIS VOLUME.

Ala.	Alabama Supreme Court Reports, 1840—
Allen	Allen's Massachusetts Reports, 1861—1867.
Am. L. Reg.	American Law Register, 18—.
Am. Ld. Cas.	American Leading Cases, 1871.
Atk.	Atkins' English Chancery Reports, 1736— 1755.
Barb.	Barbour's New York Supreme Court Re- ports, 1847—1875.
Barnard. Ch.	Barnardiston English Chancery Reports, 1740—1741
Beav.	Beavan's English Rolls Court Reports, 1836—1866.
Bing.	Bingham's English Common Pleas Re- ports, 1822—1834.
Bisp. Eq.	Bispham's Treatise on Equity, 1878.
Blatchf.	Blatchford's U. S. Circuit Court Reports, 1845—1882.
Bridg.	Bridgman's English Common Pleas Re- ports, 1613—1621.
Bro. Ch.	Brown's English Chancery Reports, 1778— 1794.
Cas. Temp.	Cases in the time of Chancellor Talbot, Talbot. 1734—1738.
Cas. Temp.	Cases in the time of Chancellor Finch.
Cent. L. J.	Central Law Journal, 1874—

Ch. Div. . . .	English High Court, Chancery Division, Reports, 1875-
Co.	Coke's English Kings Bench Reports, 1572-1616.
Colles P. C. . .	Colles' English House of Lords Reports, 1697-1714.
Conn.	Connecticut Supreme Court Reports, 1814-
Cooley Princ. * .	Cooley Principles of Constitutional Law, Const. L. . . . 1882.
Cox. Ch. . . .	Cox's English Chancery Cases, 1783-1796.
Cranch	Cranch's U. S. Supreme Court Reports, 1800-1815.
Dall.	Dallas' U. S. Supreme Court Reports, 1790-1800.
Daly	Daly's New York Common Pleas Reports, 1859-1880.
Dana	Dana's Kentucky Reports, 1833-1840.
Deady	Deady's U. S. Circuit Court Reports, 1861-
DeG. & Sm. . .	DeGex and Smale's English Vice-Chancellor's Reports, 1846-1852.
Dr. & Sm. . . .	Drewry and Smale's English Chancery Reports, 1860-1865.
Dr. & War. . . .	Drury and Warren's Irish Chancery Reports, 1841-1843.
Dyer.	Dyer's English Kings Bench Reports, 1513-1532.
Eden	Eden's Chancery Reports, 1757-1767.
Eq. Cas.	English Equity Cases, 1876-
Eq. Cas. Ab. . .	English Equity Cases Abridged, 1792.
Esp.	Espinasse's English Nisi Prius Reports, 1793-1807.

Grant's Cas.	. Grant's Pennsylvania Cases, 1852-1863.
Gratt. Grattan's Virginia Reports, 1844-1881.
H. & M. Hemming and Miller's English Vice-Chancellor's Reports, 1862-1865.
Hare Hare's English Vice-Chancellor's Reports, 1841-1853.
H. L. Cas. . .	. English House of Lords Cases, 1847-1865.
How. Howard's U. S. Supreme Court Reports, 1843-1860.
Hun Hun's New York Supreme Court Reports, 1873-
Ill. Illinois Reports, 1819.
Ind. Indiana Supreme Court Reports, 1848.
Indermaur Ld.	. Indermaur's Leading Cases in Equity,
Cas. Eq. . . .	1881.
Iowa Iowa Supreme Court Reports, 1855.
Ir. Rep. (L.) .	. Irish Reports, Common Law, 1867-1878.
Jac. & W. . .	. Jacob and Walker's English Chancery Reports, 1819-1821.
Johns. Johnson's New York Reports, 1806-1823.
Johns. Ch. . .	. Johnson's New York Chancery Reports, 1814-1823.
Jur. (n. s.) . .	. English Jurist (new series), 1855-1856.
Kas. Kansas Supreme Court Reports, 1862-
L. R. Ch. English Law Reports (Chancery) 1866-1875.
L. R. Ch. App. .	. English Law Reports (Chancery Appeal), 1866-1875.
L. R. Eq. English Law Reports (Equity), 1866-1875.

- L. R. H. L. Cas. . English Law Reports (House of Lords),
1866-1875.
- L. T. (N. S.) . . English Law Times (new series), 1859-
- Macn. & G. . . Macnaghten and Gordon's English Chan-
cery Cases, 1849-1851.
- Macq. . . . Macqueen's Scotch Cases in House of
Lords, 1851-1873.
- Mass. . . . Massachusetts Supreme Court Reports,
1804-
- Md. . . . Maryland Supreme Court Reports, 1851-
- Md. Ch. . . . Maryland Chancery Reports, 1847-1854.
- Me. . . . Maine Supreme Court Reports, 1820-
- Miss. . . . Mississippi Supreme Court Reports, 1818-
- Mos. . . . Moseley's English Chancery Reports,
1726-1731.
- Mylne & Cr. . . Mylne and Craig's English Chancery Re-
ports, 1836-1840.
- N. H. . . . New Hampshire Reports, 1816-
- N. J. (Eq.) . . New Jersey Equity Reports, 1830-
- N. Y. . . . New York Court of Appeals Reports,
1847-
- Otto Otto's U. S. Supreme Court Reports,
1875-
- Paige Ch. . . . Paige's New York Chancery Reports,
1828-1845.
- Pa. St. . . . Pennsylvania State Reports, 1844-
- Pet. . . . Peter's United States Supreme Court Re-
ports, 1827-1842.
- Phila. . . . Philadelphia Reports, 1850.
- Pomeroy Const. . Pomeroy's Manual of Constitutional Law,
L. . . . 1883.

Prec. in Ch. . . .	Finch's Precedents in Chancery, 1689-1723.
P. Wms. . . .	Peere Williams' English Chancery Reports, 1695-1736.
Redf. . . .	Redfield's New York Surrogate Reports, 1857-1880.
Rich. Eq. . . .	Richardson's South Carolina Chancery Reports, 1844-1846.
Sandf. Ch. . . .	Sandford's New York Chancery Reports, 1843-1847.
Sel. Cas. Ch. . . .	Select Cases in Chancery (English).
Sim. . . .	Simon's English Vice-Chancellor's Reports, 1826-1849.
Sim. (N. S.) . . .	Simon's English Vice-Chancellor's Reports (new series), 1850-1854.
Snell Eq. . . .	Snell's Treatise on Equity Jurisprudence, 1881.
Story	Story's U. S. Circuit Court Reports, 1839-1845.
Swanst. . . .	Swanston's English Chancery Reports, 1818-1819.
Tex. . . .	Texas Supreme Court Reports, 1846-
Tud. Ld. Cas. . .	Tudor's Mercantile and Marine Cases.
Tud. Ld. Cas. .	Tudor's Leading Cases on Conveyancing.
Con. . . .	
Vern. . . .	Vernon's English Chancery Reports, 1681-1720.
Ves. . . .	Vesey, jr.'s, English Chancery Reports, 1789-1816.
Ves. Sr. . . .	Vesey, sr.'s, English Chancery Reports, 1747-1756.

Ves. & B. . . .	Vesey & Beames' English Chancery Reports, 1812-1814.
Vin. Ab. . . .	Viner's Abridgement of Law and Equity, 1791-1794.
Vt.	Vermont Supreme Court Reports, 1826-
Wall.	Wallace's U. S. Supreme Court Reports, 1863-1875.
Wh. & Tud. Ld. .	White & Tudor's Leading Cases in Cas. Eq. . . . Equity.
Wheat.	Wheaton's United States Supreme Court Reports, 1816-1827.
Wis.	Wisconsin Supreme Court Reports, 1853-
W. R.	English Weekly Reporter, 1853-
Wms. Real Assets . . .	Williams' Treatise on Real Assets, 1861.
W. Va.	West Virginia Supreme Court Reports, 1863-

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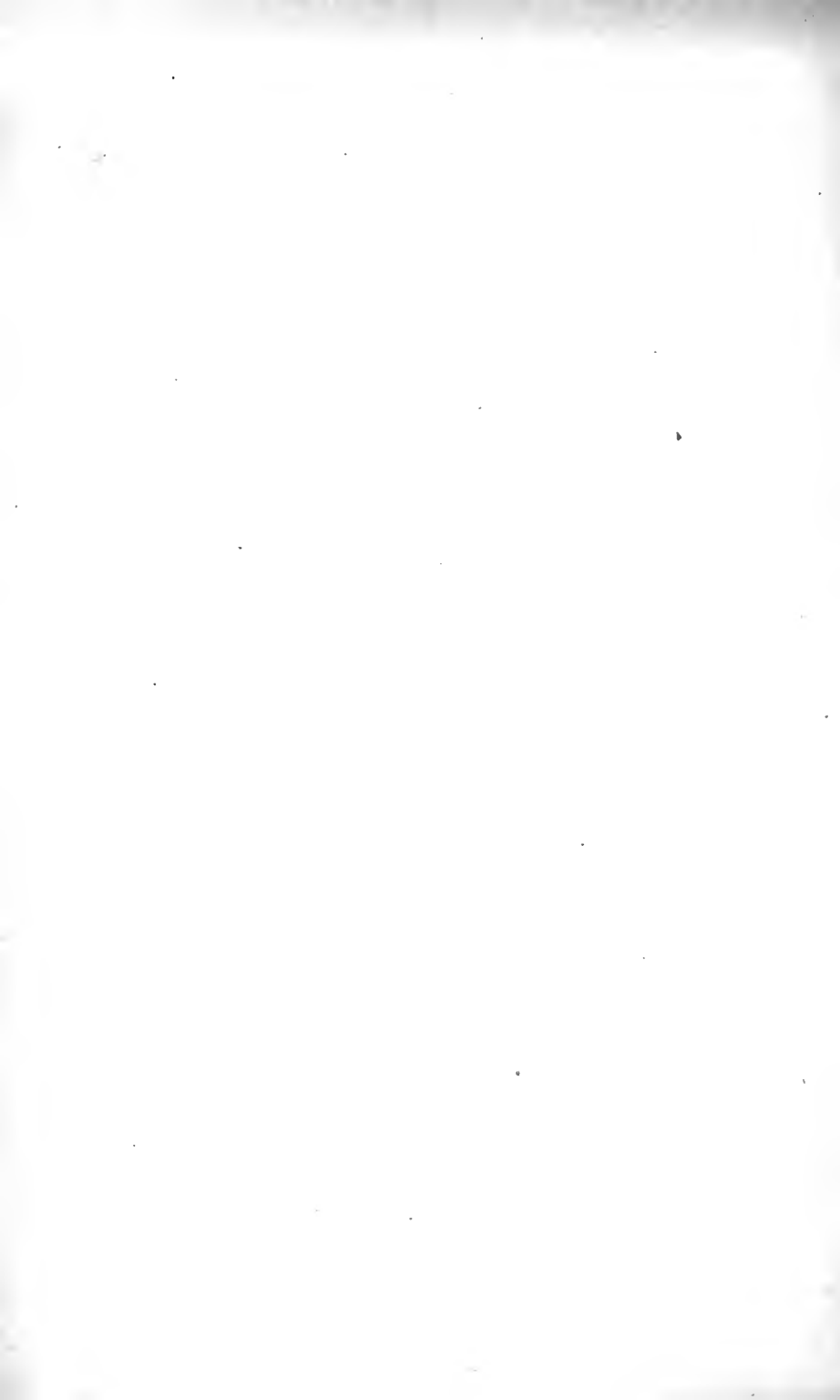
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